(10)

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March 10, 1989

Title: Richard H. Austin, Michigan Secretary of State and Frank J. Kelley, Michigan Attorney General, Appellants
v.
Michigan Chamber of Commerce

Court: United States Court of Appeals for the Sixth Circuit

Counsel for appellant: Caruso,Louis J.

Counsel for appellee: Perrone,William J., Boyden,Joel M.

Entry	Date	Note	Proceedings and Orders
1	Mar 10 1989	G	Statement as to jurisdiction filed.
3	Apr 10 1989		Brief amicus curiae of Common Cause filed.
2	Apr 11 1989		Motion of appellee MI Chamber of Commerce to affirm filed.
4	Apr 12 1989	X	Brief amicus curiae of Federal Election Commission filed.
5	Apr 12 1989		DISTRIBUTED. April 28, 1989
6	May 1 1989		PROBABLE JURISDICTION NOTED.
			**********
8	May 15 1989		Order extending time to file brief of appellant on the merits until June 29, 1989.
9	Jun 14 1989		Joint appendix filed.
11	Jun 27 1989		Brief of appellants Austin, et al. filed.
10	Jun 29 1989		Brief amicus curiae of Federal Election Commission filed.
12	Jun 29 1989		Brief amicus curiae of Common Cause filed.
13	Jul 10 1989	D	Motion of Federal Election Commission for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Jul 26 1989		Brief amicus curiae of Center for Public Interest Law filed.
14	Jul 27 1989		Brief of appellee MI Chamber of Commerce filed.
15	Jul 27 1989		Brief amici curiae of American Medical Association, et al. filed.
17	Jul 28 1989		Brief amici curiae of Washington Legal Foundation, et al. filed.
18	Jul 28 1989		Brief amici curiae of National Organization for Women, et al. filed.
19	Jul 28 1989		Brief amicus curiae of ACLU filed.
20	Aug 24 1989		CIRCULATED.
21	Aug 25 1989	X	Reply brief of appellant Michigan filed.
24	Aug 28 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 31, 1989. (3RD CASE)
22	Aug 30 1989		Motion of Federal Election Commission for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
23	Aug 30 1989		Record filed.
		*	Certified copy of original record and proceedings, box, received.
25	Oct 31 1989		ARGUED.

88-1569

Supreme Court, U.S.
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CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

RICHARD H. AUSTIN,
Michigan Secretary of State,
and FRANK J. KELLEY,
Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF
COMMERCE, a non-profit Michigan
Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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STATEMENT OF QUESTION PRESENTED

Whether a non-profit corporation formed to promote the interests of the business community, which draws 75 percent of its funds from business corporations, may constitutionally be barred from expending such funds in political campaigns advocating the nomination, election, or defeat of a designated candidate or candidates for public office.

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OPINIONS AND ORDERS OF THE COURTS BELOW

The December 14, 1988 order denying petition for rehearing en banc is set forth in the attached Appendix, p. 30a, infra. The September 15, 1988 opinion of the United States Court of Appeals for the Sixth Circuit (App. p. 1a, infra) is published at 856 F2d 783 (6th Cir, 1988). The September 3, 1986 opinion and judgment of the United States District Court for the Western District of Michigan is published at 643 F Supp 397 (WD Mich, 1986) (App. pp. 39a, 78a, infra).

JURISDICTION

The judgment of the United States Court of Appeals, holding MCL § 169.254(1) (West 1988 Supp), which bars the expenditure of corporate treasury money in Michigan candidate elections, unconstitutional as applied to the Michigan State Chamber of

Commerce, "a nonprofit Michigan corporation ... comprised of about eight thousand voluntary members, approximately seventy-five percent of whom are corporations," (App. p. 3a), was entered on September 15, 1988. A petition for rehearing en banc was denied on December 14, 1988. (App. p. 30a.) The Appellants filed a timely Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on March 1, 1989. (App. p. 79a.) This Court has jurisdiction of this appeal pursuant to 28 USC § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute at issue, MCL § 169.254(1) (West 1988 Supp), in pertinent part, states:

> Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure ... .

The other relevant provisions of the Michigan Campaign Finance Act, Act No. 388 of 1976, MCL § 169.201 et seq (West 1988

Supp) are reprinted in the Appendix, p. 83a, infra.

STATEMENT OF THE CASE

A. Background

For over seventy-five years, the Michigan legislature has recognized that election activity by business organizations in the corporate form pose special problems of corruption and the appearance of corruption. As early as 1913, Michigan enacted the Corrupt Practices Act[1] which banned the use of corporate treasury funds for the payment of election expenses. This statutory ban withstood a constitutional attack in People v Gansley, 191 Mich 357, 158 NW 195 (1916). Consistent with that precedent and its

[1]Act No. 109 of the Public Acts of 1913.

expert judgment that a general prohibition on contributions and expenditures by business corporations in candidate elections is necessary to achieve compelling public interests, the Michigan legislature for decades has protected the integrity of the electoral process by enacting, re-enacting and refining laws[2] barring corporations from utilizing treasury funds to finance contributions, expenditures or independent expenditures in connection with candidate elections. At issue in this case is the ban on independent expenditures from treasury funds by a non-profit corporation, the Michigan State Chamber of Commerce, formed to promote the interests of the business

[2]See Act No. 351 of tne Public Acts of 1925, Pt. 5, Ch. II, § 14; Act No. 116 of the Public Acts of 1954, § 919; and Act No. 227 of the Public Acts of 1975, § 95.

community, which accepts corporate monies in the form of dues from its thousands of corporate members. That ban prevents the Michigan State Chamber of Commerce from serving as a conduit for corporate treasury money into Michigan candidate elections.

The statute at issue, MCL § 169.254(1), prohibits "a corporation" from utilizing treasury funds to finance independent expenditures in connection with a state candidate election. An independent expenditure is defined as an expenditure[3] which "is not made at the direction of, or

[3]"Expenditure" is defined by § 6 of the Act as "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." MCL § 169.206(1).

under the control of, another person and if the expenditure is not a contribution to a committee." MCL § 169.209(1). The Act permits, however, the use of such treasury funds for "the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL § 169.255(1). Business corporations are restricted to soliciting contributions to those separate segregated funds (political action committees) from stockholders, officers and directors, and executive and administrative personnel of the corporation. MCL § 169.255(2).

Non-profit corporations are restricted to soliciting contributions from individual members and their spouses, stockholders, officers and directors, and executive and

administrative personnel of a non-profit corporation. MCL § 169.255(3). A separate segregated fund must register with the Michigan Department of State as an "independent committee"[4] or a "political committee"[5] and is subject to registration and reporting requirements.[6]

Similarly, any "person"[7] who receives contributions or makes expenditures in

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[4]"Independent committee" is defined by § 8(2) of the Act, MCL § 169.208(2).

[5]"Political Committee" is defined by § 11(2) of the Act. MCL § 169.211(2).

[6]The registration and reporting requirements are contained in §§ 24-26, 28, 31-33, 32, 33, 35-38 of the Act. MCL §§ 169.224, 169.225, 169.226, 169.228, 169.231, 169.232, 169.233, 169.235, 169.236, 169.237, and 169.238.

[7]"Person" is defined by § 11(1) of the Act as a "business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." MCL § 169.211(1).

connection with a state candidate election in the amount of $200.00 or more in a calendar year, is a "committee"[8] for purposes of the Act and is subject to registration and reporting requirements.

The Michigan State Chamber of Commerce ("State Chamber") is a non-profit, membership corporation formed in 1959 under Michigan law to promote the common good and the interests of the Michigan business community. (App. pp. 3a, 41a.) More than 75 percent of the 8,000 members of the State Chamber are profit-making business corporations, such as General Motors, Ford, Chrysler, etc. (App. pp. 3a, 33a.) All State Chamber members, corporate and non-corporate, are assessed and pay annual dues to the State Chamber. (App. p. 3a.)

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[8]"Committee" is defined by § 3(4) of the Act. MCL § 169.203(4).

On June 10, 1985, a special election was scheduled to be held to fill a vacancy caused by the resignation of the incumbent in the 93rd Legislative District for the Michigan House of Representatives. (App. pp. 4a, 42a-43a.) Through a paid advertisement in the June 9, 1985 Grand Rapids Press, the State Chamber sought to make an independent expenditure out of its treasury funds in support of Richard Bandstra, a candidate in the special election.[9] (App. p. 4a.) Because a violation of the ban on independent expenditures in candidate elections by a corporation constitutes a felony, punishable

[9]The State Chamber, if it had desired, could have paid for the advertisement in question through its separate segregated fund, the State Chamber Political Action Committee, which was established in 1977. (App. pp. 7a, 42a.)

by a fine of $10,000.00, the State Chamber was precluded from making the independent expenditure at issue.[10] It, then, filed an action in the United States District Court for the Western District of Michigan for declaratory and injunctive relief against Appellants on May 24, 1985, challenging the constitutionality of § 54(1) which prohibits corporate independent expenditures in candidate elections.

B. The Decisions of the Courts Below

Following the completion of discovery, a four-day non-jury trial was conducted before

[10]Section 54(5) of the Act, MCL § 169.254(5), imposes criminal penalties upon violators of § 54(1) of the Act:

> A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

The Honorable Douglas W. Hillman, Chief Judge, on May 9 and 12, 1986, and June 12 and 13, 1986. Judge Hillman issued his opinion on September 3, 1986 concluding that the ban on corporate independent expenditures in candidate elections as applied to the State Chamber was not violative of the First Amendment because the ban "serve[d] the state's compelling interest in preventing corruption or the appearance of corruption in the electoral process." (Footnote omitted.) (App. p. 59a.) The Court further found that § 54(1) was valid under the Equal Protection Clause of the Fourteenth Amendment. Accordingly, on September 3, 1986, the District Court entered a judgment in favor of Appellants and against Appellee. (App. p. 78a.)

On September 16, 1986, the State Chamber filed its Notice of Appeal with the United States Court of Appeals for the Sixth Circuit. On September 15, 1988, the Court of Appeals reversed holding that § 54(1) as applied to the State Chamber is unconstitutional, "for it infringes upon speech at the core of the first amendment without a compelling justification." (Footnote omitted.) (App. p. 28a.)

On September 28, 1988, Appellants filed a petition for rehearing en banc in the Court of Appeals. On December 14, 1988, an order was entered denying the petition. (App. p. 30a.) Four judges of the Sixth Circuit on December 27, 1988 dissented from the order denying the petition for rehearing en banc, asserting that the Court of Appeals decision violated this Court's holding in

Federal Election Commission v Massachusetts Citizens for Life, Inc., 479 US 238 (1986). (App. p. 32a.)

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING SECTION 54(1) UNCONSTITUTIONAL AS APPLIED TO THE MICHIGAN STATE CHAMBER OF COMMERCE, A NON-PROFIT CORPORATION FORMED TO PROMOTE THE INTERESTS OF THE BUSINESS COMMUNITY, WHICH DRAWS 75 PERCENT OF ITS FUNDS FROM BUSINESS CORPORATIONS.

The question presented in this appeal is so substantial as to require plenary review by this Court for two principal reasons.

First, the decision below is manifestly inconsistent with the plain teachings of the controlling opinions of this Court in such cases as Federal Election Commission v Massachusetts Citizens for Life, Inc., 479 US 238 (1986) (MCFL) and Federal Election Commission v National Right to Work Committee, 459 US 197 (1982) (NRWC).

Second, the question presented has great and immediate national importance because the decision below, if followed, would render unconstitutional as applied to the corporate conduits of business corporations the well-established laws of the United States and at least twenty states barring the expenditure of corporate treasury funds in connection with political elections.

A. The Decision Below Is In Direct Conflict With The Decisions Of This Court.

Since the enactment of the Tillman Act[11] in 1907, federal laws have prohibited corporations from making contributions and expenditures for the purpose of influencing the election of a candidate to federal

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[11] Act of 1907, ch. 420, 34 Stat. 864 (1907).

office.[12] The laws of at least twenty states contain similar, long-standing prohibitions against both contributions and expenditures by corporations.[13] In Federal Election

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[12]The current prohibition is contained in Section 441b of the Federal Election Campaign Act, 2 USC § 441b. The history of this provision and its predecessors has been reviewed by this Court in United States v UAW, 352 US 567, 570-584 (1957); and Federal Election Commission v National Right to Work Committee, 459 US 197, 208-209 (1982).

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See Ala. Code §§ 10-2a-70, 10-2a-70.1, 10-2a-70.2 (1987 and 1988 Supp.); Conn. Gen. Stat. Ann. § 9-3330 (West 1988 Supp.); Iowa Code Ann. § 56.29 (West 1988 Supp.); Ky. Rev. Stat. § 121.025 (1988 Supp.); Minn. Stat. Ann. § 211B.15 (West 1988-1989 Supp.); Miss. Code Ann. § 97-13-15 (1988 Supp.); Mont. Code Ann. § 13-35-227 (1987); N.H. Rev. Stat. Ann. § 664:4(I) (1986); N.Y. Elec. Law § 14-116 (McKinney 1978 and 1988 Supp.); N.C. Gen. Stat. § 163-278.19 (1988); N.D. Cent. Code § 16.1-08-02(1) (1987 Supp.); Ohio Rev. Code Ann. § 3599.03 (Page 1988); Okla. Stat. Ann. title 74, § 4219 (West 1988 Supp.); Pa. Stat. Ann. title 25, § 3253 (Purdon 1988 Supp.); S.D. Codified Law § 12-25-2 (1982); Tenn. Code Ann. § 2-19-132 (1985); Tex. Election Code Ann. § 251.010 (Vernon 1986 and 1988 Supp.); W. Va. Code § 3-8-8 (1987); Wis. Stat. Ann. § 11.38 (West 1986); Wyo. Stat. Ann. § 22-25-102 (1988 Cum. Supp.).

Commission v National Right to Work Committee, 459 US 197 (1982), this Court unanimously upheld those restrictions. Although the incorporated National Right to Work Committee was expending treasury funds for the purpose of soliciting contributions to its separate segregated fund, the logic of the Court's holding and the thrust of its reasoning are plainly applicable to both corporate contributions and corporate expenditures. The present Chief Justice in NRWC reaffirmed for the Court: "the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." 459 US at 208. He then traced the history of "the movement to regulate the political contributions and expenditures of

corporations and labor unions," 459 US at 208, and declared:

> [W]e accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. NRWC, 459 US at 210.

The parallel determination of the Michigan Legislature as set forth in MCL § 169.254(1), being part of the same reform movement, is entitled to the same "considerable deference." NRWC, 459 US at 209.

In Federal Election Commission v Massachusetts Citizens for Life, Inc., 479 US 238 (1986), this Court held over the dissent of four justices that the ban on independent expenditures cannot constitutionally be applied to a small,

grass roots group incorporated to advocate a political issue, if it derives all of its funds from the voluntary contributions of individuals. The opinion carefully and explicitly limited the holding so that it would not reach corporations like the Michigan State Chamber of Commerce, which derive a major portion of their funds from business corporations:

> In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by Section 441b's restriction upon independent spending ... Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political market place. 479 US at 263-264.

The Court below overrode this careful limitation or "feature" by treating it as if it read "conduits for massive undisclosed

corporate political spending," and by then reading the applicable Michigan statutes to require the State Chamber to disclose the sources of its political support. On both points, the Court's conclusions are erroneous. The MCFL limitations do not exclude only undisclosed corporate political contributions; they exclude any corporate money. Not only the great body of federal and state laws regulating political contributions and expenditures but the opinions of this Court rest upon the realization that disclosure is not always a sufficient safeguard against the appearance and actuality of corruption resulting from large political contributions and expenditures. "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized."

(Citation omitted.) Federal Election Commission v National Right to Work Committee, 459 US at 210.

Judge Merritt, in the dissent from the denial of en banc review, recognized that because the State Chamber accepts corporate money from its 6,000 corporate members, it will serve as a conduit "for the type of direct spending that creates a threat to the political marketplace." (Citation omitted.) (App. p. 35a.) Accordingly, Judge Merritt concluded that the decision below disregarded the third limitation set forth in MCFL:[14]

> The panel decision, therefore, permits the very evil which all members of the Supreme Court agreed a state could prohibit. The panel allows the Chamber

[14]Judge Merritt also recognized that the Court of Appeals decision violated the first and second limitations set out by this Court in MCFL. (App. pp. 36a-37a.)

> to serve as a conduit for the type of direct spending that Michigan legislators believe creates a threat to the political marketplace. (Citation omitted.) (App. p. 36a.)

Furthermore, the Michigan disclosure statute cited by the Court below, MCL § 169.251(1), does not apply to the State Chamber or other incorporated conduits of the funds of business corporations. A conduit corporation would be a "committee" under the Michigan Campaign Finance Act, MCL § 169.203(4). The disclosure statute applies only to a "person, other than a committee." MCL § 169.251(1). Thus, if the decision below is followed, the State Chamber and other conduit corporations would be able to accept corporate money in the form of dues from any "member" business corporation and convert such unlimited amount of money into political expenditures

on behalf of political candidates, without ever disclosing the true source of financing.

Appellants recognize that NRWC, by a very narrow reading, can be limited to raising funds for corporate contributions prohibited by federal law and that MCFL did not require a decision upholding federal and state power to prohibit corporate expenditures for the purpose of influencing political elections. But even upon the narrowest reading, the precedents of this Court show that the question presented by the present case is substantial. Our position is squarely sustained by the view of the four dissenting judges in MCFL. In like manner, our position is sustained by the view of the four dissenting judges in the Court of Appeals, who would have granted en banc

review because they were of the view that the decision below violated this Court's holding in MCFL. (App. p. 32a). Furthermore, this Court's prior decisions, which can be read to treat the question as unresolved, implicitly assume that the question herein deserves full consideration by this Court. See, Federal Election Commission v Massachusetts Citizens for Life, Inc., 479 US at 263; First National Bank of Boston v Bellotti, 435 US 765, 788, n. 26 (1978).

Accordingly, Appellants respectfully submit that the decision below conflicts with MCFL and NRWC, and should be reviewed by this Court.

B. The Decision Below Has a Potentially Adverse Impact On The Campaign Finance Laws Of The United States And Twenty States.

The national importance of the constitutional question presented by this

case is plain. 2 USC § 441 would prohibit the expenditures involved in this case if made by the State Chamber to support a political candidate for federal office.[15] MCFL, 479 US at 263-264. Under the decision below 2 USC § 441b of the Federal Election Campaign Act, so applied, would be unconstitutional. Twenty state statutes prohibit expenditures by corporations in support of candidates in state elections.[16] Because they facially apply to all corporations without qualifications, the decision below throws doubt upon the

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[15]During the 1947 Congressional Debates on the Labor Management Relations Act of 1947, (Taft-Hartley Act), 61 Stat. 136 (1947), Senator Taft specifically stated that the National Association of Manufacturers and the United States Chamber of Commerce, which had corporate members, could not use treasury funds in federal election campaigns. 93 Cong. Rec. 6438 (1947).

[16]See supra note 14 and accompanying text.

constitutionality of all those state laws as applied to their state and local chambers of commerce and similar membership and trade organizations.

Michigan State Chamber of Commerce is far from unique. Formed to promote the class of business interests, it is duplicated in other national, state, regional and local chambers of commerce. The country is filled with similar organizations promoting the special political interests of business and narrower classes of businesses, of professions, and of other special economic units, including bankers, insurers, automobile dealers, building contractors, realtors, retailers, stockbrokers, and manufacturers.

There can be little doubt that if the decision below stands, it will open a wide

conduit for a flood of business corporation expenditures supporting or opposing candidates for federal and state office.[17] The ever-increasing flood of political contributions and expenditures in congressional campaigns has been documented by the Federal Election Commission.[18] The intense desire of business interests to spend more and more money for electioneering

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[17]The treasurer of the State Chamber has already boasted that the decision below applies to all ideologically based trade associations, incorporated citizen groups and other incorporated organizations. Detroit News, September 27, 1988, at 1B, col. 5.

[18]Total congressional candidate campaign expenditures increased from $194.8 million in the 1977-1978 campaigns to over $450 million in the 1985-1986 election cycle. Congressional Spending Tops $450 Million in 1986, 13 Federal Election Commission 2 (1987). For the 1987-1988 election cycle, congressional candidate campaign expenditures totaled $457 million. N.Y. Times, February 25, 1989 at 9, col. 1.

is evidenced by the growing number of political action committees (PACs) and PAC contributions.[19] Under the decision below the management of a business corporation wishing to draw upon its corporate funds amassed for business purposes in order to obtain government benefits by supporting particular electoral candidates has only to join other like-minded corporate managements in channeling corporate funds through a non-profit corporation, perhaps along with a much smaller amount of money from individuals, in order to accomplish indirectly what they cannot do directly consistently with law.

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[19]More than 1900 separate segregated funds have been established by corporations, which reported to the Federal Election Commission receiving $81.9 million in voluntary political contributions and expending $79.2 million on contributions and expenditures during the 1983-1984 election cycle. See FEC Reports on Financial Activity 1985-1986, Vol. I at p. 78 (March, 1988).

In short, the decision below, if followed, will substantially alter federal election campaigns and candidate election campaigns in at least twenty states. The question of whether a conduit corporation should be permitted to use corporate treasury funds for unlimited political expenditures with no public disclosure of the actual sources of such funds is a question of significant national importance, which merits plenary consideration by this Court.

CONCLUSION

Based on the foregoing arguments and authorities, Appellants Richard H. Austin and Frank J. Kelley respectfully request that this Court note probable jurisdiction in this appeal, and set this case for briefing and argument on the merits.

Respectfully submitted,

FRANK J. KELLEY
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APPENDIX

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No. 86-1867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN STATE CHAMBER OF COMMERCE,
a non-profit Michigan corporation,
Plaintiff-Appellant,
v

Richard H. AUSTIN, Michigan Secretary of State; and FRANK J. KELLEY, Michigan Attorney General,
Defendants-Appellees.

Decided and Filed September 15, 1988

Before ENGEL, Chief Judge*, RYAN, Circuit Judge, and PECK, Senior Circuit Judge.

*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

RYAN, Circuit Judge.

This appeal concerns the constitutionality of § 54(1) of the Michigan Campaign Finance Act under the first and fourteenth amendments to the United States Constitution, and article I of the Michigan Constitution. Section 54(1) severely restricts the ability of corporations to make indirect expenditures in support of or in opposition to the elec-

tion of a candidate for Michigan office. Although directly infringing upon the first amendment free speech guarantees of corporations, § 54(1) was upheld by the district court as a narrowly drawn regulation that serves the compelling state interest of preventing the threat or appearance of corruption. We conclude that indirect expenditures made by a nontraditional corporation, like the Michigan State Chamber of Commerce, formed for essentially ideological purposes and to disseminate economic and political ideas and not to amass capital, do not pose the threat or appearance of corruption. We hold that § 54(1), as applied to the Chamber, is unconstitutional under the first amendment.

I.

Plaintiff-appellant, the Michigan State Chamber of Commerce (the Chamber), is a

nonprofit Michigan corporation funded by the annual dues which its corporate and noncorporate members are required to pay. The defendants-appellees are Richard H. Austin, the Michigan Secretary of State, and Frank J. Kelley, the Michigan Attorney General.

The Chamber is comprised of about eight thousand voluntary members, approximately seventy-five percent of whom are corporations. The Chamber characterizes itself as an ideological corporation formed to promote the common good and interests of the Michigan business community. The Chamber's objectives and purposes, as stated in its bylaws, include promoting conditions conducive to economic development, training and educating its members, encouraging the maintenance and observance of ethical business practices, and receiving expenditures and making contributions for political purposes.

In June of 1985, the Chamber sought to place a paid advertisement in the Grand Rapids Press in support of Richard Bandstra, the Republican nominee for the 93rd Legislative District for the Michigan House of Representatives. However, because § 54(1) of the Michigan Campaign Finance Act (the Act), Mich. Comp. Laws Ann. (M.C.L.A.) § 169.254(1) (1987 Supp.), appeared to prohibit the ad, the Chamber brought suit seeking declaratory and permanent injunctive relief allowing it to support political candidates through advertisements and other independent expenditures.[1]

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[1]Section 54(5) of the Act, M.C.L.A. § 169.254(5) (1987 Supp.), imposes criminal penalties upon violators of § 54(1):

> A person who knowingly violates this section is guilty of a felony and shall be punished by fine of not more than $5,000.00 or imprisoned for not more than three years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

Section 54(1) of the Act provides that:

> Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a).

M.C.L.A. § 169.254(1). The Act defines an "expenditure" as including:

> A payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. An offer or tender of an expenditure is not an expenditure if expressly and unconditionally rejected or returned.

M.C.L.A. § 169.206(1). An "independent expenditure" is defined as an expenditure:

> [B]y a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.

M.C.L.A. § 169.209(1).

The Act provides an exception to § 54(1)'s ban on corporate independent expenditures

through § 55. M.C.L.A. § 169.255 (1987 Supp.). This exception allows a corporation to make independent political expenditures if it establishes a separate segregated fund to be used solely for political purposes, a so-called "PAC." M.C.L.A. § 169.255(1). Corporate solicitation of contributions to a segregated fund of this type is limited to statutorily specified persons.[2] The Chamber's proposed ad in the Grand Rapids Press falls squarely within the Act's definition of an "indirect expenditure." See M.C.L.A. § 169.209(1), supra. The Chamber has established a segregated fund under the

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[2]A nonprofit corporation may solicit contributions to its separate political fund from the following persons or their spouses: members of the corporation who are individuals, stockholders or members of the corporation, officers or directors of members of the corporation who have policymaking, managerial, professional, supervisory, or administrative nonclerical responsibilities. M.C.L.A. § 169.255(3)(a)-(d).

§ 55 exception, the Michigan State Chamber of Commerce Political Action Committee. However, it sought to make its indirect expenditure in support of Bandstra through the Chamber's general treasury funds.

The Chamber challenges the limitations § 54(1) places on a corporation's freedom to make independent political expenditures as violative of the first and fourteenth amendments to the Constitution and article I, §§ 2, 3, and 5 of the Michigan Constitution. First, the Chamber argues that § 54(1) violates its freedom of speech as guaranteed by the first amendment and article I, §§ 3 and 5 of the Michigan Constitution. Second, the Chamber argues that § 54(1) violates the equal protection clauses of the fourteenth amendment and article I, § 2 of the Michigan Constitution by distinguishing between corporate and noncorporate business entities.

Third, the Chamber argues that the Act violates its equal protection guarantees by exempting members of the print and broadcast media from the limitations of § 54(1). See M.C.L.A. § 169.206(3)(d) (1987 Supp.).

II.

Our analysis, like that of the district court, focuses only upon the Chamber's guarantees under the United States Constitution. The Michigan Supreme Court interprets the protections of article I, §§ 2, 3, and 5 of the Michigan Constitution identically with the United States Constitution in the context of legislative restraints upon electoral activities. See Advisory Opinion on Constitutionality of 1975 P.A. 227, 396 Mich. 465, 484-85, 492-93, 242 N.W.2d 3, 9-10, 14 (1976).

We first examine the Chamber's first amendment challenge to § 54(1). Where a government restricts the speech of a private person, including a corporation, the state action may be sustained only if the government can show that the regulation is a pre-

cisely drawn means of serving a compelling state interest. See Consolidated Edison Company v. Public Service Comm'n, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed.2d 319 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978); Buckley v. Valeo, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976) (per curiam).

Citing the Supreme Court's holding in Buckely v. Valeo, supra, and Federal Election Comm'n v. National Conservative Political Action Committee, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 1468-69, 84 L.Ed.2d 455 (1985), that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances," the district court upheld § 54(1) based upon its determination that:

> Section § 54(1)'s prohibition of corporate independent expenditures in political elections serves the state's compelling interest in preventing corruption or the appearance of corruption in the electoral process.

Michigan State Chamber of Commerce v. Austin, 643 F.Supp. 397, 402 (W.D. Mich. 1986). The court held that although there had been no finding of actual corruption, a finding of the threat or appearance of corruption was sufficient. Id. at 404. The court reasoned that a showing of the threat of corruption alone sufficed given the "great aggregations of capital and influence" and "faceless nature" of corporations, id. at 403, as well as the need for courts to not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." Id. at 404 (citing Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210, 103 S.Ct. 552, 561, 74 L.Ed.2d 364 (1982)).

In light of the Supreme Court's intervening decision in Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), it now appears that the district court defined the issue in this case too broadly. The district court held that the case presented the issue of whether a state "may prohibit corporations from making independent expenditures to influence elections for public office." Michigan State Chamber of Commerce, 642 F.Supp. at 403 (emphasis added). The Supreme Court has yet to specifically address the issue as stated by the district court. See Massachusetts Citizens for Life, 479 U.S. at 264, 107 S.Ct. at 631, 93 L.Ed.2d at 560; National Conservative Political Action Comm., 470 U.S. at 496, 105 S.Ct. at 1468; Bellotti, 435 U.S. at 788, n. 26, 98 S.Ct. at 1422, n. 26.

In Massachusetts Citizens for Life, the Court addressed a nonprofit corporation's first amendment challenge to the Federal Election Campaign Act's (FECA) prohibition against indirect corporate political expenditures.[3] The Court found a distinction between "traditional corporations organized for economic gain," Massachusetts Citizens for Life, 479 U.S. at 259, 107 S.Ct. at 628, 93 L.Ed.2d at 557 (citing National Conservative Political Action Comm., 470 U.S. at 500, 105 S.Ct. at 1470),

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[3]Section 316 of FECA, 2 U.S.C. § 441b (1985), is similar to § 54 of the Michigan Campaign Finance Act. Section 441b prohibits corporations organized under the authority of any law of Congress from using their treasury funds to make "expenditure[s] in connection with any election to any political office ..." and all corporations from making indirect expenditures in federal elections. Also like the Michigan Act, FECA, in § 441b, provides an exception for corporations which establish separate segregated funds for political activity.

and corporations "formed to disseminate political ideas, not to amass capital." Id. Traditional corporations raise "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." Id. 479 U.S. at 257, 107 S.Ct. at 628, 93 L.Ed.2d at 556. Because this prospect is not presented by a corporation which is instead formed to disseminate political ideas, the mere threat or appearance of corruption "hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom." Id. 479 U.S. at 263, 107 S.Ct. at 630, 93 L.Ed.2d at 560 (emphasis in original).

We now reexamine the district court's holding in light of Massachusetts Citizens for Life.

III.

The Chamber's proposed political advertisement is speech which lies at the core of the first amendment.

> The [Federal Election Campaign] Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v United States, 354 US 476, 484, 77 S Ct 1304 [1308] 1 L Ed 2d 1498, 14 Ohio Ops 2d 331 (1957). Although First Amendment protections are not confined to "the exposition of ideas," Winters v New York, 333 US 507, 510, 68 S Ct 665 [667] (1948), 92 L Ed 840, "there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates ...." Mills v Alabama, 384 US 214, 218, 86 S Ct 1434 [1436] (1966), 16 L Ed 2d 484. This is no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v Sullivan, 376 US 254, 270, 84 S Ct 710 [720] 11 L Ed 2d 686, 95 ALR2d

> 1412 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v Roy, 401 US 265, 272, 91 S Ct 621 [625] (1971), 28 L Ed 2d 35, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley v. Valeo, 424 U.S. at 14-15, 96 S.Ct. at 632-33.

The Chamber does not surrender its first amendment rights merely by assuming the corporate form of organization.

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation ....

Bellotti, 435 U.S. at 784, 98 S.Ct. at 1420.

Nonetheless, a corporation's political speech through contributions and independent expenditures can be constitutionally

restricted if the government can show that the regulation is a "precisely drawn means of serving a compelling state interest." Consolidated Edison, 447 U.S. at 540, 100 S.Ct. at 2334. The Supreme Court has held that:

> [P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.

National Conservative Political Action Comm., 470 U.S. at 496-97, 105 S.Ct. at 1468-69.

The Supreme Court has invalidated independent expenditure limits in two contexts: the 1971 Campaign Act's ceiling on expenditures by individuals and groups, Buckley v. Valeo, 424 U.S. at 51, 96 S.Ct. at 650, and the Presidential Election Campaign Fund Act's limitation on expenditures by independent political committees, National Conservative Political Action Comm., 470 U.S. at 496-501, 105 S.Ct. at 1468-71.

The Court has not addressed the constitutionality of limitations on indirect political expenditures by traditional corporations that function as profit-making enterprises. Massachusetts Citizens for Life, 479 U.S. at 263, 107 S.Ct. at 630, 93 L.Ed.2d at 560. However, the Court has upheld the FECA limitations on a corporation's solicitation of contributions to its segregated political purpose fund. Federal Election Comm. v. National Right to Work Comm., 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982).

> In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulations. See United States v Morton Salt Co., 338 US 632, 652, 70 S Ct 357 [368] (1950), 94 L Ed 401. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophy-

> lactic measures where corruption is the evil feared. As we said in California Medical Assn. v. FEC, 453 US 182, 201, 101 S Ct 2712 [2724] (1981), 69 L Ed 2d 567, the "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."

National Right to Work Comm., 459 U.S. at 209-10, 103 S.Ct. at 560-61.

Despite the opportunity to do so, the Court did not extend the compelling state interest analysis of contribution limitations in National Right to Work Comm. to the independent expenditure limitations which FECA places on nonprofit corporations organized to disseminate political ideas.[4]

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[4]"We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." Massachusetts Citizens for Life, 479 U.S. at 259, 107 S.Ct. at 628, 93 L.Ed.2d at 557 (citing National Conservative Political Action Comm., 470 U.S. at 500, 105 S.Ct. at 1470; California Medical Ass'n v. Federal Election Comm., 453 U.S. 182, 194, 196-97, 101 S.Ct. 2712, 2721, 2721-22, 69 L.Ed.2d 567 (1981); Buckley v. Valeo, 424 U.S. 20-22, 96 S.Ct. at 635-36).

Massachusetts Citizens for Life, 479 U.S. at 263, 107 S.Ct. at 630, 93 L.Ed.2d at 560. Massachusetts Citizens for Life, Inc. (MCFL) was a nonprofit, nonstock corporation organized for the purpose of disseminating ideas supportive of the pro-life movement. It was composed of "members" who either supported its activities or contributed to the organization. It did not accept contributions from corporations or unions. Under these facts, the Court found that the "spectre of corruption" was not a sufficiently compelling interest to justify FECA's impact upon MCFL's first amendment rights. Id.

Thus, the Court specifically rejected the analysis employed by the district court in this case. The Chamber is a nonprofit corporation comprised of voluntary members who have banded together to promote their common interest in Michigan's business community.

It is in essence a corporation formed for ideological purposes and is a "voluntary political association." As such, it does "not suddenly present the spectre of corruption merely by assuming the corporate form." Id. 479 U.S. at 262, 263, 107 S.Ct. at 629-30, 93 L.Ed.2d at 559-60.

The district court made no finding that independent expenditures by corporate entities like the Chamber actually corrupted the electoral process. Rather, the court held that "a finding of the threat or appearance of corruption is enough." Michigan State Chamber of Commerce, 643 F.Supp. at 404. We conclude, as the court did in Massachusetts Citizens for Life, that "[t]his hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom." Massachusetts Citizens for Life, 479 U.S. at 263, 107

S.Ct. at 630, 93 L.Ed.2d at 560 (emphasis in original).

The Court in Massachusetts Citizens for Life noted that MCFL had three features which were essential to the Court's holding that any appearance of corruption resulting from MCFL's independent expenditures was not a compelling state interest. First, like the Chamber, MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." Id. The Chamber is organized as a nonprofit corporation under state and federal laws. Although its bylaws empower it to provide training and education for its members and to collect data and make surveys, they also empower the chamber to promote conditions favorable to the economic development of Michigan and to "perform any ... acts of a political nature permitted by the laws of

the state of Michigan." Therefore, the Chamber, much like MCFL, was formed to promote and disseminate ideas--in the case of the Chamber, ideas and interests supportive of Michigan's business community--not to amass capital. And, like MCFL, "the resources it has available are not a function of its services in the economic marketplace, but its popularity in the political marketplace." Id. 479 U.S. at 259, 107 S.Ct. at 628, 93 L.Ed.2d at 557.

Second, the Court noted that MCFL, like the Chamber, "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings." Id. The Chamber is funded by annual dues. Members who fail to timely pay these dues are subject to suspension by the Chamber. The Chamber's members are not akin to minority shareholders of a "traditional" corporation who

do not support the same candidates supported by the corporation's independent political expenditures.

> Individuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor .... Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

Id. 479 U.S. at 260, 107 S.Ct. at 629, 93 L.Ed.2d at 558.

Third, the Court noted that:

> MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. 479 U.S. at 263, 107 S.Ct. at 630, 93 L.Ed.2d at 560. The Chamber is not a sub-

corporation established by a parent corporation. However, approximately seventy-five percent of its eight thousand members are corporations. Nonetheless, the Michigan Campaign Finance Act forecloses the danger of the Chamber's corporate members using the Chamber as a conduit for massive undisclosed corporate political spending. Section 51 of the Act. M.C.L.A. § 169.251(1) (1987 Supp.), requires that each person[5] who makes independent expenditures in excess of one hundred dollars in one calendar year in support of a candidate, file a report with the county clerk. The report must include, among other things, the name and address of each person who contributed more than one hundred dollars to the expenditure. Thus,

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[5]The Act's definition of "person" includes individuals as well as corporations. M.C.L.A. § 169.211(1).

the reporting obligations of § 51 of the Act preclude, as a practical matter, the prospect of "faceless" Chamber corporate members utilizing the Chamber as a conduit through which massive undisclosed contributions are funneled for political purposes. Further, § 47 of the Act requires that printed advertisements, like that proposed by the Chamber, which relate to a candidate and are funded by indirect expenditures, contain the name of the person paying for the ad. M.C.L.A. § 169.247(1) (1987 Supp.). If the advertisement is not authorized by the candidate's own committee, it must so state. M.C.L.A. § 169.247(3).

We conclude that the Chamber, like Massachusetts Citizens for Life, Inc., is not the type of "traditional corporatio[n] organized for economic gain." Massachusetts Citizens for Life, 479 U.S. at 259, 107

S.Ct. at 628, 93 L.Ed.2d at 557 (citing National Conservative Political Action Comm., 470 U.S. at 500, 105 S.Ct. at 1470). It exists for purely ideological purposes. Its "business" is to develop, promote, and disseminate pro-business ideas and to influence political decisions. Since it does not operate in "the economic sphere," it does not exercise economic power as a result amassing "great aggregations of capital." Consequently, it does not and cannot exercise the kind of economic power the district court found "may very well create an atmosphere of distrust or the appearance of corruption in the electoral process." Michigan State Chamber of Commerce, 643 F.Supp. at 403. The potential for unfair deployment of wealth for political purposes is not presented by the Chamber's mere incorporation. The defen-

dants have failed to make the necessary showing of actual corruption required to uphold the constitutionality of § 54 as applied to the Chamber. We therefore hold that § 54's restriction on independent corporate spending is unconstitutional as applied to the Chamber, for it infringes upon speech at the core of the first amendment without a compelling justification.[6]

Because we find that the application of § 54 to the Chamber's speech is not supported by a compelling state interest, we need not consider the Chamber's arguments that the

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[6]As noted, § 54's limitation on corporate independent expenditures applies to all corporations, including traditional corporations organized for economic gain as well as corporations like the Chamber which are organized to disseminate political ideas and not to amass capital. We draw no conclusions as to whether the state's interest in preventing the appearance or threat of corruption supports the application of § 54 to traditional corporations.

section is not "precisely drawn," Consolidated Edison, 447 U.S. at 540, 2234, or that it is violative of the equal protection clause of the fourteenth amendment. Accordingly, the judgment of the district court upholding § 54 is REVERSED.

Filed December 14, 1988--Leonard Green, Clerk

NO. 86-1867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN STATE CHAMBER OF COMMERCE, A NON-PROFIT MICHIGAN CORPORATION, Plaintiff-Appellant, v. RICHARD H. AUSTIN, MICHIGAN SECRETARY OF STATE, AND FRANK J. KELLEY, MICHIGAN ATTORNEY GENERAL, Defendants-Appellees.	ORDER

BEFORE: ENGEL, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

FILED December 27, 1988-Leonard Green, Clerk

No. 86-1867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN STATE CHAMBER OF COMMERCE, A NON-PROFIT MICHIGAN CORPORATION, Plaintiff-Appellant, v. RICHARD H. AUSTIN, MICHIGAN SECRETARY OF STATE, AND FRANK J. KELLEY, MICHIGAN ATTORNEY GENERAL, Defendants-Appellees.	ORDER

Upon consideration, it is ORDERED that the order denying rehearing en banc in this matter filed on December 14, 1988, is hereby amended to include the dissent of Circuit Judge Gilbert S. Merritt, attached hereto.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 86-1867

MICHIGAN STATE CHAMBER OF COMMERCE v. AUSTIN

MERRITT, Circuit Judge, dissenting from denial of en banc review. This case should be reconsidered en banc. Because our Court's decision holds unconstitutional a crucial provision of the Michigan Campaign Finance law, the Michigan Chamber of Commerce may now act as a conduit for large sums of money contributed by its corporate members--General Motors, Ford, Chrysler, etc.--in support of the corporations' favorite political candidates. The opinion simply does not apply the standard set out in the Supreme Court's ruling in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). There the Court laid down the 1st Amendment principle that such state laws are constitutional, except in very limited circumstances which it described as follows:

> We acknowledge the legitimacy of [the] concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.
>
> . . .
>
> In particular, [the pro-life corporation here] has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. First. . . . If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, [the corporation] was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace (emphasis added).

479 U.S. at 263-64. Four members of the Court dissented from even this narrow 1st Amendment

restriction on state control of corporate political contributions: Chief Justice Rehnquist, and Justices White, Blackmun and Stevens.

The Michigan Chamber meets none of these three "features essential to our holding," much less all of them. For example, the Supreme Court specifically stated that the pro-life group at issue could not "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." Id. at 264. The panel of our Court describes the Chamber as "comprised of about eight thousand voluntary members, approximately seventy-five percent of whom are corporations." Michigan State Chamber of Commerce v. Austin, No. 86-1867, slip op. at 2 (6th Cir. Sept. 15, 1988)(emphasis added). Thus, the panel itself--without recognizing

it--characterized the Michigan Chamber so as to place it outside the narrow exception carved out by the Supreme Court for a pro-life, nonprofit, nonstock corporation which only published a newsletter that urged its members to vote "pro-life" in the upcoming elections. The Michigan Chamber's money for placement of advertisements for political candidates came from, at least, 6000 corporate members. The panel decision, therefore, permits the very evil which all members of the Supreme Court agreed a state could prohibit. The panel allows the Chamber to serve as a conduit for the type of direct spending that Michigan legislators believe creates a threat to the political marketplace. MCFL, 479 U.S. at 264.

In addition, the first prong of the test is not met because the record does not

reflect that the members received clear notice that their dues would be used for political contributions. Neither is there any showing that the "economic incentives" of all Chamber members are served by the political contributions under the second prong of the test, or that all members would "associate" themselves with the Chamber's political contributions.

The entire Court should address this important case. The Michigan law was adopted after due consideration of a serious problem by popularly elected legislators concerned about what they considered to be the corrupting influence of corporate contributions on the electoral process. The doctrine of judicial restraint cautions that we should not disregard or broadly expand the narrow principle clearly drawn by the Supreme Court

two years ago. The Court has made its ruling, and we must follow it.

Keith, Kennedy and Jones, JJ., concur in the foregoing dissent.

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Plaintiff,

-vs-

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Defendants.
_____/

Case No. G85-496 CA5
OPINION

This lawsuit concerns the constitutionality of section 54(1) of the Michigan Campaign Finance Act, M.C.L. § 169.254(1), under the First and Fourteenth Amendments to the United States Constitution and Article I of the Michigan Constitution. Plaintiff is the Michigan State Chamber of Commerce. Defendants are Richard H. Austin, the

Michigan Secretary of State, and Frank J. Kelley, the Michigan Attorney General.

On May 24, 1985, plaintiff filed this action for declaratory and injunctive relief against the enforcement of section 54(1) of the Michigan Campaign Finance Act (the "Act"). Section 54(1) prohibits corporations from making an expenditure in support of or in opposition to the nomination or election of a political candidate. A corporation which violates section 54(1) is guilty of a felony and subject to a fine of $10,000. M.C.L. § 169.254(5). In brief, plaintiff alleges that section 54(1) violates the First Amendment, the equal protection clause of the Fourteenth Amendment, and similar provisions of the Michigan Constitution.

On May 9 and 12, and June 12, 13, 1986, the parties tried this lawsuit to this court

without a jury. The following opinion constitutes this court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

FACTUAL and PROCEDURAL BACKGROUND

Plaintiff is a non-profit, Michigan corporation established in 1959 and consisting of approximately 8,000 members. Of those 8,000 members, more than 75 percent are corporations. Plaintiff seeks to promote the economic interests of its members and Michigan businesses generally through a number of activities. For example, plaintiff furthers the business training and education of its members by sending its members newsletters, bulletins, and reports and by organizing seminars and conventions. Plaintiff also seeks to encourage and maintain ethical business practices. Finally,

plaintiff assumes an active role in political affairs as part of its work for its members and Michigan businesses. Plaintiff participates in the political process by lobbying the Michigan legislature with respect to particular legislation or regulations, advocating the passage or defeat of ballot questions, and communicating with its members about partisan political issues. In addition, plaintiff established in 1977 a separate segregated fund--the Michigan State Chamber of Commerce Political Action Committee ("Chamber PAC")--that, among other things, directly participates in political elections. Plaintiff's role in the Michigan electoral process is the subject of this litigation.

A special election was called for Monday, June 10, 1985, to fill a vacancy in the 93rd

legislative district for the Michigan House of Representatives. Through a paid advertisement in the June 9, 1985 edition of the Grand Rapids Press[1] plaintiff wished to make a public statement in support of Richard Bandstra, a candidate in the special election. Plaintiff's intended statement was not at the direction or under the control of Mr. Bandstra or any committee advocating his election. Fearing criminal prosecution under M.C.L. § 169.254(5), plaintiff filed this action for declaratory and permanent injunctive relief allowing it to support, apart from the Chamber PAC, the nomination and election of political candidates such as Richard Bandstra through political advertisements and other independent expenditures.[2]

During the trial of this matter on May 9 and 12, and June 12 and 13, 1986, the court

heard the testimony of seven witnesses and received 53 exhibits into evidence.[3] All seven witnesses provided a much needed background or context to the constitutional questions presented in this lawsuit. The testimony of H. Richard Mayberry, Jr., on behalf of plaintiff, and Edwin W. Epstein, on behalf of defendants, proved especially helpful to the court. Those gentlemen each testified with much candor and expertise concerning the realities of campaign financing specifically and political elections generally. Although I must often agree with Carl Sandburg's observation that "[a]n expert is only a damned fool a long ways from home", in this case the expertise of Mr. Mayberry and Mr. Epstein aided the court's understanding of the political realities and competing interests underlying the constitutional issues raised by govern-

mental regulation of political campaigns. Their testimony, along with the testimony of the other witnesses, informed and shaped the following discussion. See Federal Election Commission v. National Conservative Political Action Committee, ___ U.S. ___, 105 S.Ct. 1459, 1469 (1985).

The issues raised by this case have been extensively and amply briefed by the parties. In addition, the court permitted the Michigan Democratic Party to file an amicus curiae brief at the summary judgment hearing. The Michigan Democratic Party subsequently sought leave to file a post-trial memorandum. I permitted the filing of this memoranda under the erroneous impression plaintiff had no objection. Plaintiff timely objected and I regret the misunderstanding. However, the amicus brief, in no way, affected the outcome of the case.

DISCUSSION

A. Section 54(1) of the Michigan Campaign Finance Act.

Section 54(1) of the Michigan Campaign Finance Act is the product of a long standing effort by the Michigan legislature to regulate abuses of the electoral process. Along with several other states and the federal government, the State of Michigan enacted legislation during the Progressive Era prohibiting corporate contributions and, expenditures in connection with political elections. See generally 1913 P.A. 109, § 14; People v. Gansley, 191 Mich. 357, 158 N.W. 195 (1916). See also United States v. Auto. Workers, 352 U.S. 567, 570-76 (1957). In the wake of the scandals surrounding the 1972 Presidential election, the Michigan legislature amended the Corrupt Practices

Act of 1913 in 1975 and again in 1976.[4] See 1975 P.A. 227; 1976 P.A. 388. The 1976 Act greatly expanded the role of corporations in Michigan political elections by allowing corporations to establish and fund the administration of separate segregated funds, which could make expenditures in support of political candidates. See M.C.L. § 169.255(1). In section 54(1) of the 1976 Act, however, the Michigan legislature continued the prohibition of corporate expenditures in political elections found in the 1913 Corrupt Practices Act.

Section 54(1) of the Michigan Campaign Finance Act provides that:

> "Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a)."

M.C.L. § 169.254(1). The Act defines an "expenditure" to include "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." M.C.L. § 169.206(1). Within the larger class of expenditures, the Act defines an "independent expenditure" as "an expenditure . . . by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." M.C.L. § 169.209(1).

In this case, plaintiff's proposed advertisement in favor of candidate Bandstra

involved an independent expenditure within the meaning of the Act. Plaintiff intended to make a payment of money for goods or services in assistance of the election of a candidate. That payment was not to be made at the direction or under the control of candidate Bandstra or his campaign committee. Accordingly, plaintiff's proposed payment for the newspaper advertisement in favor of candidate Bandstra would have constituted an independent expenditure under the Act. See M.C.L. §§ 169.206(1), 169.209(1).

Before considering plaintiff's constitutional challenges to section 54(1), I must first determine whether section 54(1) prohibits corporate independent expenditures such as plaintiff's proposed independent expenditure in support of candidate Bandstra.

See United States v. C.I.O., 335 U.S. 106 (1948). Section 54(1), by its terms, fails to prohibit "independent expenditures" by corporations. Instead, section 54(1) prohibits the larger class of "expenditures" by corporations without an explicit prohibition of the narrower class of independent expenditures. Nonetheless, because all "independent expenditures" are "expenditures" within the meaning of the Act, the prohibition of "expenditures" in section 54(1) by definition includes a prohibition of "independent expenditures." For example, if the numbers 1 and 2 comprise sub-set A and the number 1, 2, 3, and 4 comprise set B, then an exclusion of set B without mention of sub-set A would require exclusion of sub-set A as well. Consequently, this court cannot avoid ruling upon plaintiff's constitutional challenges to section 54(1) based

upon the argument that section 54(1) fails to prohibit corporate independent expenditures such as the advertisement proposed by plaintiff in favor of Richard Bandstra.

B. The Constitutionality of Section 54(1).

Plaintiff challenges the constitutionality of the prohibition of corporate independent expenditures in political elections by section 54(1) under the United States and Michigan Constitutions. Specifically, plaintiff contends that section 54(1) violates its freedom of speech as guaranteed by the First Amendment to the Constitution[5] and Article I, §§ 3, 5 of the Michigan Constitution. Second, plaintiff alleges that section 54(1)'s prohibition of corporate independent expenditures violates the equal protection clause of the Fourteenth

Amendment and Article I, § 2 of the Michigan Constitution by distinguishing between corporate and other non-corporate business entities. Finally, plaintiff complains that the Act violates the equal protection clause of the Fourteenth Amendment and Article I, § 2 of the Michigan Constitution by exempting certain newspaper articles from the reach of section 54(1). See M.C.L. § 169.206(3)(d).

Throughout the pretrial and trial proceedings of this matter plaintiff failed to distinguish between its claims under the United States Constitution and its claims under the Michigan Constitution. However, with regard to the context of legislative restraints upon electoral activities, the Michigan Supreme Court interprets Article I, §§ 2, 3, and 5 of the Michigan Constitution

identically with similar protections in the First and Fourteenth Amendments to the Constitution. See Advisory Opinion 1975 Constitutionality of 1975 P.A. 227, 396 Mich. at 484-85, 492-93, 242 N.W.2d at 9-10, 14. Accordingly, the following analysis under the First and Fourteenth Amendments to the Constitution shall apply equally to plaintiff's claims under the Michigan Constitution.

(1) The First Amendment and Corporate Independent Expenditures in Political Elections -- The First Amendment to the Constitution forbids states from enacting any law abridging the freedom of speech. E.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-501 (1952). Section 54(1)'s prohibition of corporate independent expenditures in political elections strikes at

speech within the traditional core of the First Amendment. As the Court explained in Buckley v. Valeo, 424 U.S. 1, 14-15 (1976),

> "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure the unfettered interchange of idea for the bringing about of political and social changes desired by the people' Roth v. United States, 354 U.S. 476, 484 (1957). . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'"

In addition, speech such as a corporate independent expenditure in a political election "does not lose its First Amendment protection because money is spent to project

it." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). Section 54(1) limits corporations' means to participate in the electoral process. Section 54(1), therefore, imposes a limitation upon plaintiff's freedom of speech by prohibiting corporate independent expenditures in political elections. Section 54(1), however, is not unconstitutional simply because it places a restraint upon protected speech. Instead, this court must determine whether defendants can offer sufficient justification for the limitation upon plaintiff's freedom of speech. Specifically, I must consider whether the prohibition of corporate independent expenditures in political elections found in section 54(1) is (i) a reasonable time, place, or manner restriction, or (ii) a narrowly tailored means of

serving a compelling state interest. See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 535 (1980).

Reasonable time, place or manner regulations that fulfill a significant governmental interest and leave ample alternative channels for communication are permissible under the First Amendment. Id. A governmental regulation upon speech cannot be justified as a time, place, or manner restriction if based upon either the content or subject matter of the speech.

"[T]ime, place, and manner regulations must be 'applicable to all speech irrespective of content.'" Id. at 536 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)). Although some regulations defy easy classification as a content/subject matter regulation or a time, place, manner

regulation,[6] section 54(1) clearly imposes a content/subject matter regulation upon corporations' speech. Section 54(1) prohibits particular speech precisely because of the content of that speech -- speech "in assistance of, or in opposition to, the nomination or election of a candidate." M.C.L. § 169.206(1). Consequently, section 54(1)'s prohibition of corporate independent expenditures in political elections cannot be upheld as a content-neutral time, place, or manner regulation. See Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13, 22 (1st Cir. 1985).

Defendants may prohibit corporate independent expenditures in political elections if that prohibition is a precisely drawn means of serving a compelling state interest. See Consolidated Edison Co., 447

U.S. at 540. In this case, defendants offer several justifications in support of the prohibition upon corporate independent expenditures contained in section 54(1). First, defendants maintain that section 54(1) protects the integrity of the electoral process by preventing corruption and the appearance of corruption created by large, corporate independent expenditures on behalf of political candidates. Second, defendants argue that section 54(1) protects the interests of some shareholders by preventing the use of corporate funds to elect political candidates whom those shareholders may oppose. Third, defendants contend that section 54(1) ensures that the electorate is fully informed of the sources of campaign finances by requiring corporations to make their campaign expenditures from a separate segregated fund which must report the names

of its contributors. For the following reasons, I find that section 54(1)'s prohibition of corporate independent expenditures in political elections serves the state's compelling interest in preventing corruption or the appearance of corruption in the electoral process.[7]

No doubt exists that a state's interest in safeguarding the electoral process from corruption or the appearance of corruption is a compelling interest. As the Supreme Court explained in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978):

> "Preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important."

Id. at 788-89 (quoting United States v. Automobile Workers, 352 U.S. at 575). This

case, however, presents the question whether a prohibition of corporate independent expenditures in political campaigns serves the governmental interest in stemming the reality or appearance of corruption in the electoral process.

If section 54(1) prohibited individuals from making independent expenditures in political campaigns, then section 54(1) would necessarily fall as unconstitutional under the First Amendment. Buckley v. Valeo, 424 U.S. 1, 39-51 (1976)-(per curiam). In Buckley, the Court "struck down the [Federal Election Campaign Act's] limitation on individuals' independent expenditures because [it] found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." Federal Election Commission

v. National Conservative Political Action Committee, ____ U.S. ____, 105 S.Ct. 1459, 1469 (1985)-(finding the Presidential Election Campaign Fund Act's limitation on independent expenditures by political committees to be unconstitutional under the First Amendment). The Buckley Court explained that generally independent expenditures by individuals unlike direct contributions to political candidates, do not pose the dangers of actual or apparent quid pro quo arrangements between a candidate and her supporters. "The absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Buckley, 424 U.S. at 47. The Court on several occasions, however, has expressly left unanswered whether a state or

the federal government may prohibit corporations from making independent expenditures to influence elections for public office. See National Conservative Political Action Committee, 105 S.Ct. at 1468; Bellotti, 435 U.S. at 788 n.26. This case presents that exact issue.

Corporations generally share First Amendment liberties commensurate with individuals. See Bellotti, 435 U.S. at 777-86. Nonetheless, under some circumstances courts may find an unconstitutional limitation upon individuals' speech to be permissible limitation upon corporations' speech. See Pacific Gas & Electric v. P.U.C. of California, ___ U.S. ___, 106 S.Ct. 903, 917 (1986) (Marshall, J., concurring); California Medical Asseciation v. Federal Election Commission, 453 U.S. 182, 201

(1981). In the context of independent expenditures to influence political elections such as a distinction between individuals and corporations is warranted.

"Favors from government often carry with them an enhanced measure of regulation." United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). The Michigan legislature has granted corporations the advantages of perpetual life, limited liability, and wide-ranging powers to encourage economic expansion and prosperity. See generally M.C.L. § 450.1101 et seq. Such advantages allow corporations to amass great aggregations of capital and influence. In the economic sphere such power is proper and often highly beneficial to the general welfare of our society. In the political sphere, however, such power coupled with the faceless nature

of corporations may very well create an atmosphere of distrust or the appearance of corruption in the electoral process. Unlike in referenda on issues of general public interest, this atmosphere of distrust in the electorate may arise in political elections where corporate power through either independent expenditures or direct contributions becomes closely allied with candidates. The Michigan legislature, as well as the United States Congress,[8] long ago arrived at that conclusion and, accordingly, limited the role of corporations in the electoral process. See Advisory Opinion on Constitutionality of 1975 P.A. 227, 396 Mich. 465, 242 N.W.2d 3 (1976); Gansley, 191 Mich. 357, 158 N.W. 195 (1916). "The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on . . . corporations, on the other, reflect a judgment

by [the legislature] that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." California Medical Association, 453 U.S. at 201. The judgment of the Michigan legislature, as expressed in sections 54(1) and 55 of the Michigan Campaign Finance Act, "to account for the particular legal and economic attributes of corporations . . . warrants considerable deference." Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 209 (1982). Courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." Id. at 210. Section 54(1) is such a prophylactic measure narrowly tailored to the state's interest in

preventing the appearance of corruption in elections for public office.

Although section 54(1) of the Act prohibits corporations such as plaintiff from independently expending money to influence elections for public office, section 55(1) of the Act allows corporations to "make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." M.C.L. § 169.255(1). A separate segregated fund, such as the Chamber PAC, can fully participate in electoral politics. For example, the record in this case amply demonstrates that the Chamber PAC frequently makes independent expenditures to influence political elections, and those efforts have been tremendously successful in electing Chamber PAC

endorsed candidates. A separate segregated fund, however, is without the unlimited economic advantages and power of corporations with vast resources. Through its allowance for separate segregated funds, the Michigan Campaign Finance Act provides an opportunity for corporate input into electoral politics while guarding against actual or perceived alliances between corporate power and political candidates. It does not matter, of course, that there has not been a finding of actual corruption, given that corporate independent expenditures for candidates have been banned since 1913. Clearly, however, a finding of the threat or appearance of corruption is enough. Read in conjunction with section 55(1), therefore, section 54(1) is a narrowly tailored prohibition of corporate independent expenditures in political elections.

In conclusion, although directly infringing plaintiff's freedom of speech protected by the First Amendment, section 54(1)'s prohibition of corporate independent expenditures in political elections is a narrowly drawn regulation that serves a compelling state interest. Consequently, section 54(1) is valid under the First Amendment to the Constitution. Plaintiff's complaint of financial restrictions and limitations placed upon it by this legislation should more properly be addressed to the state legislature.

(2) The Equal Protection Clause and Corporate Independent Expenditures in Political Elections -- In addition to its claim under the First Amendment, plaintiff claims that section 54(1) Campaign Finance Act violates the equal protection clause of

the Fourteenth Amendment. Plaintiff presents two specific claims under the equal protection clause. First, plaintiff contends that section 54(1) of the Act impermissibly distinguishes between corporations, on one hand, and noncorporate business entities and labor unions, on the other hand, in prohibiting independent expenditures in political elections. Second, plaintiff argues that the Act impermissibly discriminates against plaintiff and other non-media corporations by exempting media corporations from the prohibition of section 54(1). See M.C.L. § 169.206(3)(d).

Corporations are entitled to the equal protection of the laws as guaranteed by the Fourteenth Amendment. E.g., Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U.S. 150 (1897). The equal protection clause of

the Fourteenth Amendment "'does not require things which are different in fact or opinion to be treated in law as though they were the same.'" Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)). Instead, the equal protection clause forbids "invidious" distinctions between persons by the states. Williams v. Rhodes, 393 U.S. 23, 30 (1968). Federal courts consider legislative distinctions presumptively invidious when those distinctions burden the exercise of a fundamental right under the Constitution. Plyler, 457 U.S. at 216-17. In order to survive scrutiny under the Fourteenth Amendment, such distinctions must be precisely tailored to serve a compelling state interest. Id. at 217. In this case, section 54(1) of the Act burdens plaintiff's exercise of its First Amendment right to

freedom of speech,[9] which is a fundamental right under the Constitution. Therefore, any distinctions in section 54(1) between plaintiff and other persons must be precisely tailored to serve a compelling state interest. For the following reasons, I find that section 54(1) satisfies such strict scrutiny.

Section 54(1) distinguishes between corporations and non-corporate persons or entities. Section 54(1) does not distinguish between corporations and labor unions. As the record establishes in this case, a number of labor unions are incorporated in the State of Michigan. Section 54(1) prohibits independent expenditures in political elections by those labor unions as well as any other corporations. Although section 54(1) does distinguish between corporations

and non-corporate business entities such as partnerships, that distinction serves a compelling state interest. As previously explained in this opinion, section 54(1)'s burden upon plaintiff's freedom of speech serves a compelling state interest because of the unique threat of corporate power to the electoral process. See California Medical Association, 453 U.S. at 210. Therefore, plaintiff's first claim under the equal protection clause of the Fourteenth Amendment must fail.

As its second claim under the equal protection clause, plaintiff maintains that section 54(1) impermissibly distinguishes between media and non-media corporations. Section 6(3)(d) of the Act, M.C.L. § 169.206(3)(d), establishes that an expenditure under section 54(1) does not include:

> "An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting."

Section 6(3)(d) makes no distinction between media and non-media corporations. Any corporation, whether termed a "media" corporation or a "non-media" corporation,[10] may avail itself of the exemption from section 54(1) provided by section 6(3)(d). Cf. United States v. C.I.O., 335 U.S. 106 (1948). Therefore, plaintiff's second claim under the equal protection clause must fail.

SUMMARY

In summary, the prohibition of corporate independent expenditures in political elections by section 54(1) of the Michigan Campaign Finance Act burdens plaintiff's

freedom of speech as protected by the First Amendment. Nonetheless, section 54(1)'s prohibition of corporate independent expenditures in political elections is a narrowly drawn regulation that serves a compelling state interest. Consequently, section 54(1) is valid under the First Amendment to the Constitution and Article I, §§ 3 and 5 of the Michigan Constitution.

With respect to plaintiff's claims under the equal protection clause of the Fourteenth Amendment, any distinctions between corporations and non-corporate entities have been narrowly tailored to serve a compelling state interest. Further, in its prohibition of corporate independent expenditures to influence elections for public office, section 54(1) of the Act makes no distinction between "media" corporations and

"non-media" corporations. Consequently, section 54(1) is valid under the equal protection clause of the Fourteenth Amendment to the Constitution and Article I, § 2 of the Michigan Constitution.

Douglas W. Hillman
Chief Judge

Dated: _____

FOOTNOTES

1. The Grand Rapids Press is a daily newspaper with a circulation of approximately 140,000. The Grand Rapids Press is the only major daily newspaper in the Grand Rapids metropolitan area.

2. Although this court denied plaintiff's motion for a temporary injunction with respect to the June, 1985 special election, this "case falls within the class of controversies 'capable of repetition, yet evading review.'" First National Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). Consequently, I find that this case is not moot and proceed to consider the merits of plaintiff's claims.

3. At trial, the parties offered six additional exhibits: plaintiff's exhibits 15 and 16, and defendants' exhibits 7a, 7b, 7c, and 7d. The court withheld a ruling upon the admissibility of those exhibits. After considering the parties' arguments in favor and opposition to the introduction of those exhibits, I find that plaintiff's exhibits 15 and 16, and defendants' exhibits 7a and 7d are admissible into evidence.

4. In 1976, the Michigan legislature reenacted the 1975 Act in response to two advisory opinions by the Michigan Supreme Court finding the 1975 Act unconstitutional under the federal and state constitutions. See Advisory Opinion on Constitutionality of 1975 P.A. 227, 396

Mich. 123, 240 N.W.2d 193; 396 Mich. 465, 242 N.W.2d 3 (197).

5. First Amendment liberties are made applicable to the states through the due process clause of the Fourteenth Amendment. E.g., Virginia State Bd. of Pharmacy v. Virginia CItizens Consumer Council, Inc., 425 U.S. 748 (1976). Nonetheless, for the sake of clarity and consistency, I shall refer only to the First Amendment.

6. Compare City of Renton v. Playtime Theatres, Inc., ___ U.S. ___, 106 S.Ct. 925 (1986) with Id., ___ U.S. ___, 106 S.Ct. 925, 933-37 (Brennan, J., dissenting).

7. Given this holding, no reason exists to consider the merits of defendants' second and third justifications for section 54(1). Nonetheless, I note that the Supreme Court has held that "preventing corruption or the appearance of corruption are the only legitimate and compelling interest thus far identified for restricting campaign finances." Federal ELection Commission v. National Conservative Political Action Committee, ___ U.S. ___, 105 S.Ct. 1459, 1469 (1985).

8. See United States v. C.I.O., 335 U.S. 106 (1948).

9. See supra at 7.

10. I have grave doubts whether such a distinction could, in reality, be made. See Bellotti, 435 U.S. at 796 (Burger, C.J., concurring).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Plaintiff,

v

CASE NUMBER:

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury had rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against plaintiff. Costs are to be taxed as provided by law.

SEPTEMBER 03, 1986
Date

C. DUKE HYNEK
Clerk

APPROVED AS TO FORM:

Douglas W. Hillman,
Chief Judge

(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1867

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

NOTICE OF APPEAL

The Appellants Richard H. Austin, Michigan Secretary of State and Frank J. Kelley, Michigan Attorney General, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Sixth Circuit entered on September 15, 1988, finding Mich. Comp. Law Ann. § 169.254(1)

(West 1988 Supp.) to be unconstitutional as applied to Appellee, and the Order denying petition for rehearing en banc entered on December 14, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

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Dated: March 1, 1989
COC2-NOA

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1867

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

CERTIFICATE OF SERVICE

I certify that I have caused to be served, by first class mail postage prepaid, a copy of the Notice of Appeal of Richard H. Austin and Frank J. Kelley in the above-encaptioned cause on this 1st day of March, 1989, on the following counsel at the addresses set forth below:

Mr. William J. Perrone
Dykema, Gossett, Spencer, Goodnow & Trigg
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Mr. Joel M. Boyden
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248 Louis Campau Promenade, N.W.
Grand Rapids, Michigan 49503

Richard P. Gartner

MCL § 169.201. Definitions

Sec. 1. Except as otherwise defined in this act, the words and phrases defined in sections 2 to 12 shall have the meanings respectively ascribed to them in those sections for the purposes of this act.

MCL § 169.202. Ballot question; ballot question committee; business

Sec. 2. (1) "Ballot question" means a question which is submitted or which is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot.

(2) "Ballot question committee" means a committee acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question but which does not receive contributions or make expenditures or contributions for the purpose of

influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate.

(3) "Business" means a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individuals, holding company, joint stock company, receivership, trust, activity, or entity which is organized for profit or nonprofit purposes.

MCL § 169.203. Candidate; candidate committee; closing date; committee

Sec. 3. (1) "Candidate" means an individual: (a) who files a fee, affidavit of incumbency, or nominating petition for an elective office; (b) whose nomination as a candidate for elective office by a political party caucus or convention is certified to the appropriate filing official; (c) who

receives a contribution, makes an expenditure, or gives consent for another person to receive a contribution or make an expenditure with a view to bringing about the individual's nomination or election to an elective office, whether or not the specific elective office for which the individual will seek nomination or election is known at the time the contribution is received or the expenditure is made; or (d) who is an officeholder who is the subject of a recall vote. Unless the officeholder is constitutionally or legally barred from seeking reelection or fails to file for reelection to that office by the applicable filing deadline, an elected officeholder shall be considered to be a candidate for reelection to that same office for the purposes of this act only.

For purposes of section 61 to 71, "candidate" only means in a primary election, a candidate for the office of governor; and in a general election, a candidate for the office of governor or lieutenant governor but the candidates for the office of governor and lieutenant governor of the same political party in a general election shall be considered as 1 candidate.

(2) "Candidate committee" means the committee designated in a candidate's filed statement of organization as that individual's candidate committee. A candidate committee shall be presumed to be under the control and direction of the candidate named in the same statement of organization. Notwithstanding subsection (4), an individual shall form a candidate committee pursuant to section 21 when the individual becomes a candidate under subsection (1).

(3) "Closing date" means the date through which a campaign statement is required to be complete.

(4) "Committee" means a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question, if contributions received total $200.00 or more in a calendar year or expenditures made total $200.00 or more in a calendar year. An individual, other than a candidate, shall not constitute a committee.

MCL § 169.204. Contribution

Sec. 4. (1) "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services,

dues, advance, forbearance, loan, donation, pledge or promise of money or anything of ascertainable monetary value, whether or not conditional or legally enforceable, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. An offer or tender of a contribution is not a contribution if expressly and unconditionally rejected or returned.

(2) Contribution includes the purchase of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and similar fund raising events; an individual's own money or property other than the individual's homestead used on behalf of that indivi-

dual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office.

(3) Contribution does not include:

(a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $250.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.

(b) Amounts received pursuant to a pledge or promise to the extent that the amounts were previously reported as a contribution.

(c) Food and beverages, not to exceed $50.00 in value during a calendar year, which are donated by an individual and for which reimbursement is not given.

MCL § 169.205. Election; elective office

Sec. 5. (1) "Election" means a primary, general, special, or millage election held in this state or a convention or caucus of a political party held in this state to nominate a candidate. Election includes a recall vote.

(2) "Elective office" means a public office filled by an election, except for federal offices. A person who is appointed to fill a vacancy in a public office which is ordinarily elective holds an elective office. Elective office does not include the office of precinct delegate.

MCL § 169.206. Expenditure

Sec. 6. (1) "Expenditure" means a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. An offer or tender of an expenditure is not an expenditure if expressly and unconditionally rejected or returned.

(2) Expenditure includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage, or defeat of a ballot question.

(3) Expenditure does not include:

(a) An amount paid pursuant to a pledge or promise to the extent the amount was previously reported as an expenditure.

(b) An expenditure for communication by a person strictly with the person's paid members or shareholders.

(c) An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot issue or candidate by name or clear inference or an expenditure for the establishment, administration, or solicitation of contributions to a fund or independent committee.

(d) An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or

opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting.

(c) An expenditure for nonpartisan voter registration or nonpartisan get-out-the-vote activities. This exclusion shall not apply if a candidate or group of candidates sponsors or finances the activity or is identified by name with the activity. This exclusion shall apply to an activity performed pursuant to sections 491 to 524 of Act No. 116 of the Public Acts of 1954, as amended, being sections 168.491 to 168.524 of the Michigan Compiled Laws, by the secretary of state and other registration officials who are identified by name with the activity. This exclusion shall apply to a candidate who is an elected officeholder and whose office is not on the ballot for the

general election in the calendar year in which the expenditure is made or is not a candidate within the meaning of sections 3(1)(a) and 3(1)(b) and is identified by name with the activity.

MCL § 169.207. Filed; filer; filing official; fund raising event; gift

Sec. 7. (1) "Filed" means the receipt by the appropriate filing official of a statement or report required to be filed under this act.

(2) "Filer" means a person required to file a statement or report pursuant to this act.

(3) "Filing official" means the official designated pursuant to this act to receive required statements and reports.

(4) "Fund raising event" means an event such as a dinner, reception, testimonial,

rally, auction, bingo, or similar affair through which contributions are solicited or received by purchase of a ticket, payment of an attendance fee, donations or chances for prizes, or through purchase of goods or services.

(5) "Gift" means a payment, subscription, advance, forbearance, rendering, or deposit of money, services, or anything of value, unless consideration of equal or greater value is given therefor.

MCL § 169.208. Immediate family; independent committee

Sec. 8. (1) "Immediate family" means a child residing in a candidate's household, a spouse of a candidate, or an individual claimed by that candidate or that candidate's spouse as a dependent for federal income tax purposes.

(2) "Independent committee" means a committee other than a political party committee which:

(a) Filed a statement of organization as an independent committee at least 6 months before an election for which it expected to accept contributions or make expenditures in support of or in opposition to a candidate for nomination to or election to a state elective office; and received contributions from at least 25 persons and made expenditures in support of or in opposition to 3 or more candidates for nomination for or election to a state elective office in the same calendar year.

(b) Is a separate level, subsidiary, subunit, or affiliate of an organization which is an independent committee if the decisions or judgments to make contributions

or expenditures on behalf of candidates are independently exercised within the separate level, subsidiary, subunit, or affiliate of the parent organization and otherwise meets the requirements of subdivision (a).

MCL § 169.209. Independent expenditure; in-kind contribution or expenditure; loan

Sec. 9. (1) "Independent expenditure" means an expenditure as defined in section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee.

(2) "In-kind contribution or expenditure" means a contribution as defined in section 4 or expenditure as defined in section 6 other than money.

(3) "Loan" means a transfer of money, property, or anything of ascertainable mone-

tary value in exchange for an obligation conditional or not, to repay ih whole or part.

MCL § 169.210. Major political party; minor political party; nominee

Sec. 10. (1) "Major political party" means a political party qualified to have its name listed on the general election ballot whose candidate for governor received 25% or more of the popular vote cast in the preceding gubernatorial election. If only 1 political party received 25% or more of the popular vote cast for governor in the preceding gubernatorial election, then the political party with the second highest vote shall be deemed a major party.

(2) "Minor political party" means a political party qualified to have its name listed on the general election ballot but which does not qualify as a major party.

(3) "Nominee" means an individual nominated to be a candidate.

MCL § 169.211. Person; political committee; political merchandise; political party; political party commitee

Sec. 11. (1) "Person" means a business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly.

(2) "Political committee" means a committee which is not a candidate committee, political party committee, independent committee, or ballot question committee.

(3) "Political merchandise" means goods such as bumper stickers, pins, hats, beverages, literature, or other items sold

by a person at a fund raiser or to the general public for publicity or for the purpose of raising funds to be used in supporting or opposing a candidate for nomination for or election to an elective office or in supporting or opposing the qualification, passage, or defeat of a ballot question.

(4) "Political party" means a political party which has a right under law to have the names of its candidates listed on the ballot in a general election.

(5) "Political party committee" means a state central, district, or county committee of a political party which is a committee. Each state central committee shall designate the official party county and district committees. There shall not be more than 1 officially designated political party com-

mittee per county and per congressional district.

MCL § 169.212. Qualifying contribution; state elective office

Sec. 12. (1) "Qualifying contribution" means a contribution of money made by a written instrument by a person other than the candidate or the candidate's immediate family, to the candidate committee of a candidate for the office of governor which is $100.00 or less and made after April 1 of the year preceding a year in which a governor is to be elected. Not more than $100.00 of a person's total aggregate contribution may be used as a qualifying contribution in any calendar year. Qualifying contribution does not include a subscription, loan, advance, deposit of money, in-kind contribution or expenditure, or anything else of value except as prescribed in this act.

(2) "State elective office" means the office of governor, lieutenant governor, secretary of state, attorney general, justice of the supreme court, member of the state board of education, regent of the university of Michigan, member of the board of trustees of Michigan state university, member of the board of governors of Wayne state university, and member of the state legislature.

MCL § 169.251. Report of independent expenditures; violation, penalty

Sec. 51. (1) A person, other than a committee, who makes an independent expenditure, advocating the election of a candidate or the defeat of a candidate's opponents or the qualification, passage, or defeat of a ballot question, which totals an amount of $100.01 or more in a calendar year

shall file a report of the independent expenditure, within 10 days, with the clerk of the county of residence of that person. The report shall be made on an independent expenditure report form provided by the secretary of state and shall include the date of the expenditure, a brief description of the nature of the expenditure, the amount, the name and address of the person to whom it was paid, the name and address of the person filing the report, together with the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure. The filing official receiving the report shall forward copies, as required, to the appropriate filing officers as described in section 36.

(2) A person who violates this section is subject to a civil penalty of not more than $500.00.

MCL § 169.254. Contributions by corporations and joint stock companies; violation, penalty

Sec. 54. (1) Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a).

(2) An officer, director, stockholder, attorney, agent, or any other person acting for a corporation or joint stock company, whether incorporated under the laws of this or any other state or foreign country, except corporations formed for political purposes, shall not make a contribution or expenditure or provide volunteer personal

services which services are excluded from the definition of a contribution pursuant to section 4(3)(a).

(3) A corporation or joint stock company, whether incorporated under the laws of this or any other state or foreign country, except a corporation formed for political purposes, shall not make a contribution or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a), in excess of $40,000.00, to each ballot question committee for the qualification, passage, or defeat of a particular ballot question.

(4) Nothing in this section shall preclude a corporation or joint stock company from making an independent expenditure in any amount for the qualification,

passage, or defeat of a ballot question. A corporation making an independent expenditure under this subsection shall be considered a ballot question committee for the purposes of this act.

(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

MCL § 169.255. Establishment and administration and solicitation of contributions to a separate segregated fund; expenditures by corporations and joint stock companies; solicitation of contributions

Sec. 55. (1) A corporation or joint stock company formed under the laws of this or another state or foreign country may make an

expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, candidate committees, ballot question committees, political party committees, and independent committees.

(2) Contributions for a fund established by a corporation or joint stock company under this section may be solicited from any of the following persons or their spouses:

(a) Stockholders of the corporation.

(b) Officers and directors of the corporation.

(c) Employees of the corporation who have policy making, managerial, professional,

supervisory, or administrative nonclerical responsibilities.

(3) Contributions for a fund established under this section by a corporation which is nonprofit may be solicited from any of the following persons or their spouses:

(a) Members of the corporation who are individuals.

(b) Stockholders of members of the corporation.

(c) Officers or directors of members of the corporation.

(d) Employees of the members of the corporation who have policy making, managerial, professional, supervisory, or administrative nonclerical responsibilities.

(4) Contributions shall not be obtained for a fund established under this section by

use of coercion, physical force, or as a condition of employment or membership or by using or threatening to use job discrimination or financial reprisals.

(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

88-1569 (2)

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF APPELLEE MICHIGAN STATE CHAMBER OF COMMERCE TO AFFIRM

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QUESTIONS PRESENTED

The questions presented by this Motion to Affirm are whether any substantial question on the merits exists and whether further argument is required in this case where the Court of Appeals was so obviously correct in ruling that a state cannot prohibit "independent expenditures" for advocacy by an ideological nonprofit corporation when:

(a) There is no evidence of actual corruption resulting from an ideological nonprofit corporation's "independent expenditures" for advocacy;

(b) The prohibition against advocacy applies to all corporations, regardless of their size, wealth or purpose; and

(c) The prohibition against advocacy does not apply to individuals, labor unions or other unincorporated associations.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Sixth Circuit were: (1) Richard H. Austin, the Michigan Secretary of State, and Frank J. Kelley, the Michigan Attorney General, the Appellants, who at all times were represented by the Michigan Attorney General; and (2) the Michigan State Chamber of Commerce ("State Chamber"), a Michigan nonprofit corporation, the Appellee. The State Chamber does not have any parent companies, subsidiaries or affiliates.

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No. _____

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October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF APPELLEE MICHIGAN STATE CHAMBER OF COMMERCE TO AFFIRM

MOTION TO AFFIRM

Pursuant to S.Ct. R. 16.3(c) and 16.3(d), the State Chamber moves to affirm the decision of the Court of Appeals. The motion is grounded on the fact that no substantial question on the merits exists and that this Court may reasonably conclude that the decision below is so obviously correct as to warrant no further argument.

STATE STATUTE INVOLVED

The constitutionality of Section 54(1) of the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, Mich.

Comp. Laws Ann. § 169.254(1) (West 1988 Supp.), is at issue in this case:

> Except with respect to the exceptions and conditions in subsection (2) and (3) and Section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure.

The State of Michigan applies Section 54(1) of Act 388 in a manner that not only prohibits corporate "contributions" and corporate "expenditures," but that also wholly prohibits corporate "independent expenditures." An "independent expenditure" is defined as:

> "Independent expenditure" means an expenditure as defined in Section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee. [Emphasis added] [Mich. Comp. Laws Ann. § 169.209(1)]

PROCEDURAL HISTORY

On May 24, 1985, the State Chamber filed a complaint in the United States District Court for the Western District of Michigan challenging Michigan's prohibition against corporate "independent expenditures" in support of or in opposition to a candidate for political office[1] as violating the State Chamber's free expression and equal protection rights under the United States and Michigan Constitutions.

---

[1] "Independent expenditures in support of or in opposition to a candidate for political office" shall be referred to simply as "independent expenditures."

The Trial Court found that, despite the lack of any evidence of corruption, Section 54(1) does not infringe upon the State Chamber's free expression or equal protection rights. The Trial Court concluded that the mere alleged threat or appearance of corruption was sufficient to sustain the prohibition against the State Chamber's advocacy through "independent expenditures." *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986).

On appeal, the Court of Appeals concluded that, because the State Chamber was a nonprofit ideological corporation, the mere threat or appearance of corruption does not constitute a compelling state interest sufficient to justify an infringement on First Amendment freedoms. The Court of Appeals held that the state had failed to make the necessary showing of actual corruption required to uphold Section 54(1). As a result, the Court of Appeals did not find it necessary to consider the State Chamber's arguments that Section 54(1) is not "precisely drawn" or that it violates the State Chamber's equal protection rights.

On December 14, 1988, the Court of Appeals denied the state's Petition for Rehearing *En Banc*. The state filed its claim of appeal on March 1, 1989, and on March 13, 1989, the State Chamber received the state's Jurisdictional Statement.

STATEMENT OF FACTS

The State Chamber, a Michigan nonprofit membership corporation, has approximately 8,000 members, who represent, among other things, manufacturing, retail, agriculture, finance, construction and wholesale businesses. Approximately 15% of the members have 10 employees or less; 57% have 50 employees or less; and 80% have 100 employees or less. Only 20% of its members have more than 100 employ-

ees. Thus, contrary to the state's mischaracterization, 75% of the State Chambers' members are *not* profit-making business corporations *such as* General Motors, Ford and Chrysler. (Jurisdictional Statement, p. 9.)

The State Chamber is an ideological corporation formed to promote the common good and interests of the Michigan business community. It is important for the State Chamber to be involved in electoral politics because elected officials make decisions in the legislative and regulatory arenas directly affecting the business community.

In addition, unincorporated associations, such as labor unions, are involved in the electoral process but are not prohibited at all from speaking through "independent expenditures." Thus, it is important for the State Chamber to also directly participate because labor unions often line up on the opposite sides of issues and candidates from the business community.

ARGUMENTS

I.

THE COURT OF APPEALS WAS OBVIOUSLY CORRECT IN HOLDING SECTION 54(1) UNCONSTITUTIONAL AS APPLIED TO THE STATE CHAMBER.

The state argues that the Court of Appeals' decision is manifestly inconsistent with prior decisions of this Court, and that it will allow profit corporations to use the State Chamber and other ideological corporations as conduits for political activity. As will be shown, the Court of Appeals' decision is entirely consistent with this Court's prior decisions on "independent expenditures," and the state's conduit argument is unfounded and clearly does not justify the flat prohibition against the State Chamber's advocacy through "independent expenditures."

A. THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH PRIOR SUPREME COURT DECISIONS.

The state argues that the Court of Appeals' decision is contrary to this Court's decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), and *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) ("*NRWC*"). The Court of Appeals, however, fully considered and correctly applied Supreme Court precedent, including this Court's intervening decision in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 106 S.Ct. 1459, 84 L.Ed.2d 455 (1985) ("*NCPAC*") (which the state has continuously ignored throughout this litigation).

The state argues that *NRWC* is plainly applicable to corporate "contributions" *and* corporate "expenditures." The Court of Appeals correctly noted, however, that the "contributions" analysis applied in *NRWC* does not apply in an "independent expenditure" case:

> Despite the opportunity to do so, the [Supreme] Court did not extend the compelling state interest analysis of contribution limitations in *National Right to Work Comm.* to the independent expenditure limitations which FECA places on nonprofit corporations organized to disseminate political ideas. [Jurisdictional Statement App., p. 19a]

NRWC was a "*contributions*" case—not an "*independent expenditures*" case. This Court has repeatedly explained that *NRWC* is *not* dispositive of, or contrary to, "independent expenditures" cases:

> *National Right to Work Committee*, does not support the inclusion of MCFL within §441b's restrictions on direct independent spending . . . [T]he political activity at issue in that case was *contributions*, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U.S., at 200, 103 S.Ct., at 555. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. [*MCFL, supra*, 479 U.S. at 259-260]

See also *NCPAC, supra*, 470 U.S. at 495-496. Thus, the Court of Appeals' decision on "independent expenditures" is both reconcilable and consistent with this Court's decision on "contributions" in *NRWC*.

In *NCPAC* and in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), this Court recognized the fundamental constitutional difference between "contributions" and "independent expenditures." Because of this difference, this Court has consistently concluded that "independent expenditures" do not cause real or apparent corruption. In *Buckley, supra*, 424 U.S. at 47, this Court found:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as quid pro quo for improper commitments from the candidate.

See also *NCPAC, supra*, 470 U.S. at 497.

A corporate "independent expenditure" does not differ from an individual "independent expenditure" (*Buckley, supra*) or a PAC "independent expenditure" (*NCPAC, supra*) in a way which would affect this Court's conclusion that "independent expenditures" by their very nature do not cause real or apparent corruption.

In *MCFL*, this Court closely examined three features of MCFL and concluded that, with a nontraditional corporation formed to disseminate political ideas and not to amass capital, the mere threat or appearance of corruption "hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL, supra*, 479 U.S. at 263. Because there was no evidence of actual corruption, the prohibition against MCFL's "independent expenditures" was unconstitutional under the First Amendment.[2]

The State Chamber shares the same attributes and features as MCFL which led this Court to conclude that a prohibition against "independent expenditures" was unconstitutional. The State Chamber is a nonprofit corporation formed to disseminate ideas—not to amass capital. The state notes that the State Chamber is formed for and advocates on behalf of "business interests." This fact does *not* prove that the State Chamber's "independent expenditures" cause real or apparent corruption. Individual "independent expenditures" and "independent expenditures" by other economic entities such as labor unions and partnerships may also be made for business purposes. This does not necessarily mean, however, that they will cause real or apparent corruption.

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[2] Each and every time this Court has considered the constitutionality of a prohibition against corporate "independent expenditures," it has held the prohibition unconstitutional under the First Amendment. *First National Bank of Boston* v *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); *NCPAC, supra*; and *MCFL, supra*.

Like MCFL, the State Chamber's resources are not "a function of its services in the economic marketplace." Rather, as with MCFL, its resources are acquired as a result of its "popularity in the political marketplace."

B. THE STATE'S CONDUIT ARGUMENT DOES NOT JUSTIFY THE FLAT PROHIBITION AGAINST THE STATE CHAMBER'S FREE EXPRESSION RIGHTS.

The state nonetheless insists that because the State Chamber, unlike MCFL, has profit corporation members, the state can deny its First Amendment rights because the State Chamber might be used as a "conduit."[3] This attempted distinction between the State Chamber and MCFL does not justify the prohibition against the State Chamber's "independent expenditures."

First, there exist unincorporated organizations in Michigan which are tax-exempt (IRC §501(c)(6) business league) membership organizations, like the State Chamber, which have profit corporate members. These organizations are not prohibited from making "independent expenditures." The mere fact that the State Chamber made the decision to incorporate does not suddenly create the spectre of corruption through a conduit.

Second, as the Court of Appeals correctly noted, reporting obligations would preclude, as a practical matter, "faceless" corporate members utilizing the State Chamber as a conduit. Alternative less restrictive means, short of the outright prohibition of protected speech, are available to forestall any alleged "conduit" problem. A broad prophylactic rule can-

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[3] The state's argument assumes that it can constitutionally limit the free speech of profit corporations. This Court, however, has never decided the constitutionality of a prohibition against a profit corporation's "independent expenditures."

not justify treating the State Chamber any differently than MCFL, especially when "independent expenditures" as opposed to "contributions" are involved. *MCFL, supra*, 479 U.S. at 260.

The Court of Appeals noted that Section 51 of the Campaign Finance Act provides a reporting mechanism that will prevent the State Chamber from being used as a conduit. The state argues that Section 51 does not apply to corporations and that the Court of Appeals' decision must be overruled or the voting public will be denied the identities of individuals who financed the "independent expenditures" of nonprofit ideological corporations. In effect, the state concludes that, since Section 51 does not apply, the *only* alternative available is to *prohibit* "independent expenditures" by the State Chamber. The fact that the Legislature has not yet enacted a reporting requirement similar to Section 51 which applies to corporations like the State Chamber, however, cannot justify the state's absolute denial of the State Chamber's fundamental First Amendment rights to free speech and advocacy.

The Court of Appeals examined this Court's decisions in *MCFL, NCPAC, First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and *Buckley*, considered the facts that have led this Court to consistently hold every prohibition against "independent expenditures" to be unconstitutional; and, in the absence of any evidence of actual corruption, correctly decided that such a prohibition as applied to a nontraditional ideological corporation like the State Chamber is also unconstitutional under the First Amendment.

II.

THE PROHIBITION AGAINST THE STATE CHAMBER'S "INDEPENDENT EXPENDITURES" IS NOT NARROWLY TAILORED.

Not only must the prohibition against the State Chamber's "independent expenditures" serve the compelling state interest in preventing real or apparent corruption, it must also be narrowly tailored to serve that interest. *See Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

While the Court of Appeals did not reach this issue, even if there had been some proof of real or apparent corruption resulting from the State Chamber's "independent expenditures" or from profit corporations' membership in the State Chamber—which there was not—the Court of Appeals' decision should be affirmed because Section 54(1) is a fatally overbroad and underbroad response to this alleged evil.

All profit and nonprofit corporations, including charitable corporations, incorporated trade associations, professional corporations, large multinational corporations, and small closely-held corporations, regardless of size, wealth, purpose, or influence, are indiscriminately prohibited from advocating through "independent expenditures."

Act 388 does not similarly limit such direct advocacy by individuals, labor unions, business partnerships, limited partnerships, or other unincorporated organizations. A closely-held corporation employing 10 workers cannot comment on the qualifications of candidates, or join with another closely-held corporation to voice its concerns, but a labor union representing the interests of tens of thousands of workers can freely speak through "independent expenditures." There is no factual basis for finding that the potential for corruption or the appearance of corruption arising from "independent

expenditures" differs between these two organizations, i.e., is greater for the small corporation than for the labor union.

Thus, not only is Section 54(1) overbroad in including all corporations, but it is underbroad as well, under the state's reasoning, because it does not include other wealthy, influential economic entities in our society such as labor unions. The inclusion of all corporations, regardless of their size, wealth, or purpose, and the exclusion of other economic entities, such as labor unions and partnerships, undermines the plausibility of the state's purported concern regarding real or apparent corruption arising from "independent expenditures." *See Bellotti, supra*, 435 U.S. at 793.

Accordingly, even if this Court were to disagree with the Court of Appeals and conclude, even in the absence of proof, that some corporate "independent expenditures" may pose a potential for real or apparent corruption, it should affirm the Court of Appeals' reversal of the Trial Court's decision on the basis that Section 54(1) is not narrowly tailored to serve the state's purported interest in preventing real or apparent corruption.

III.

THE DISPARATE TREATMENT OF THE STATE CHAMBER VIS-A-VIS LABOR UNIONS AND OTHER UNINCORPORATED ORGANIZATIONS VIOLATES THE EQUAL PROTECTION CLAUSE.

The Court of Appeals did not find it necessary to reach the State Chamber's equal protection challenge. Should this Court disagree with the Court of Appeals' conclusions regarding the First Amendment, however, it should nonetheless affirm the Court of Appeals' reversal of the Trial Court's decision on equal protection grounds.

The prohibition against the State Chamber's "independent expenditures" is subject to strict scrutiny because it burdens the exercise of the fundamental First Amendment right of free speech. *See Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Bellotti, supra*, 435 U.S. at 785-786; *Buckley, supra*, 424 U.S. at 14; *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

Strict scrutiny requires that distinctions drawn by the state must be precisely tailored to serve a compelling state interest. *See e.g. Plyler v. Doe*, 457 U.S. 202, 216-217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). In order to meet this test, the state must prove that the State Chamber's "independent expenditures" are clearly more harmful than the "independent expenditures" of noncorporate entities, such as labor unions, which are not prohibited under Act 388 from making "independent expenditures."

In *Mosley, supra*, 408 U.S. at 92-102, this Court held that a Chicago ordinance prohibiting picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, violated the Equal Protection Clause of the Fourteenth Amendment:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, *under the Equal Protection Clause, Chicago may not maintain that picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969); *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 434 P.2d 982 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful.
>
> * * *
>
> Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. *Such excesses can be controlled by narrowly drawn statutes, Saia v. New York, 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter.* [Emphasis added] [Footnote omitted] [*Mosley, supra*, 408 U.S. at 100-101]

Michigan allows labor unions and other unincorporated organizations to make "independent expenditures." There was absolutely no showing that the State Chamber's "independent expenditures" would result in *any* real or apparent corruption, let alone that its "independent expenditures" would be *more* harmful than "independent expenditures" made by labor unions or by organizations similar to the State Chamber which have chosen not to incorporate.

Judicial notice may be taken of the fact that "big labor" is as powerful (and as capable of corruption) as big corporations (and certainly more so than small corporations). The views of corporations and labor unions vary significantly and are frequently in direct opposition to one another in the electoral process. Act 388's disparate treatment of corporations and labor unions and other unincorporated organizations thus often results in giving one side of debatable public questions an advantage in expressing its views to the people. As this Court stated in *Bellotti, supra*, 435 U.S. at 777:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted]

Given what the state tolerates from labor unions' and other unincorporated organizations' "independent expenditures," the alleged danger from some corporate "independent expenditures" may not be controlled by a broad statute prohibiting all corporate "independent expenditures." *Mosley, supra.* In the absence of any valid justification for treating corporations such as the State Chamber any differently than labor unions or other unincorporated associations, the state must deal even-handedly with all speakers regardless of their corporate status. The Court of Appeals' reversal of the Trail Court's decision, therefore, should be affirmed on equal protection grounds.

CONCLUSION

As shown above, no further argument is necessary in this case because the decision of the Court of Appeals was so obviously correct and because no substantial question on the merits exists. The State Chamber, therefore, respectfully requests this Court to grant its motion to affirm the decision of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Common Cause respectfully submits this brief as *amicus curiae* in support of the Jurisdictional Statement filed by appellants, Richard H. Austin, Michigan Secretary of State, and Frank J. Kelley, Michigan Attorney General, seeking review of the decision of the United States Court of Appeals for the Sixth Circuit. Counsel for the petitioners and counsel for the respondents have consented to the filing of this brief in letters filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Common Cause is a nonprofit, nonpartisan organization with approximately 270,000 members. One of its central purposes is to further honest and responsible government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It has filed briefs as party or *amicus curiae* in several previous cases before this Court concerning the constitutionality and implementation of the federal election laws,[1] including *FEC v. Massachusetts Citizens for Life, Inc.* (*"MCFL"*), 479 U.S. 238 (1986), the decision whose interpretation is at issue in the present case. Common Cause believes that this case raises important issues that go to the heart of legislative prohibitions on corporate spending in election campaigns.

ARGUMENT

I. The Decision Below Misconstrues This Court's Opinion in *FEC v. Massachusetts Citizens for Life* and Conflicts With a Recent Decision by Another Federal Court.

This Court should note probable jurisdiction in this case because it presents a substantial federal question and conflicts with another lower court decision. The public interest requires this question to be resolved before confusion or misapprehension about the law irretrievably affects future elections.

As the Jurisdictional Statement demonstrates, the United States Court of Appeals for the Sixth Circuit

[1] *See, e.g., FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *Buckley v. Valeo*, 424 U.S. 1 (1976).

misread a directly applicable decision of this Court, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*"MCFL"*), 479 U.S. 238 (1986). In the *MCFL* case, this Court identified the evils that Congress sought to prevent when it prohibited corporate expenditures in federal election campaigns. First, the Court noted Congress' concern that the integrity of the political process would be threatened by the "corrosive influence of concentrated corporate wealth."[2] Second, the Court observed that the statute seeks to "prevent[] an organization from using an individual's money for purposes that the individual may not support."[3] Third, the Court pointed to the danger that a corporate entity might be used as a conduit for spending by business corporations.[4] After discussing these statutory purposes, Justice Brennan wrote, "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace."[5]

The Court then carefully tailored a narrow exception for independent expenditures by nonprofit corporations whose activities did not implicate any of Congress' legitimate concerns. It held that Congress could not constitutionally prohibit genuinely independent expenditures by incorporated ideological groups having no financial ties with profit-making businesses. But one of the three features of MCFL which the Court deemed "essential to [its] holding" was the fact that MCFL was "not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as

[2] *Id.* at 257.

[3] *Id.* at 260.

[4] *Id.* at 262.

[5] *Id.* at 263.

conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 264.

This case, like *MCFL*, involves independent expenditures by a nonprofit corporation. The two cases, however, are fundamentally different. In contrast with MCFL, the Michigan State Chamber of Commerce was established by business corporations; 75 percent of its dues paying members are corporations. Therefore, it serves as a conduit for business corporate spending in the political marketplace. Nevertheless, the court of appeals held that the State Chamber of Commerce qualified for the same treatment as MCFL, and struck down Michigan's statutory prohibition on corporate independent expenditures as applied to the State Chamber. The Sixth Circuit's opinion thus ignored one of the three essential criteria set forth by this Court in the *MCFL* case.

In contrast, in April 1988, a federal district court correctly applied this Court's *MCFL* decision to reach a contrary conclusion in a similar case.[6] The United States Defense Committee (USDC), a tax-exempt nonprofit corporation which lobbies on national defense and foreign policy issues, receives contributions from business corporations as well as individuals and partnerships. On this basis, the district court concluded that USDC did not qualify for the exemption from § 441b established in the *MCFL* case.[7] Although the court of appeals reversed the district court's decision for lack of ripeness, the case demonstrates the substantial likelihood of conflicting decisions in the federal courts on the scope of the *MCFL* exception.

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[6] *United States Defense Comm. v. FEC*, No. 84-CV-450 (N.D.N.Y. Apr. 1, 1988), *vacated and remanded on other grounds*, 861 F.2d 765 (2d Cir. 1988).

[7] *See United States Defense Comm. v. FEC*, 861 F.2d 765, 766 (2d Cir. 1988).

II. The Court of Appeals' Reasoning Would Drastically Undermine Federal and State Laws Designed To Prevent the Abuses Stemming From Corporate Spending in Election Campaigns.

If allowed to stand, the decision below would prevent effective enforcement of laws prohibiting corporate expenditures in connection with election campaigns, which have been enacted by Congress and approximately twenty state legislatures.[8] Business corporations relying on the Sixth Circuit's decision will use the device of intermediary nonprofit corporations to spend wealth amassed for business purposes in election campaigns, thus creating the very dangers of corruption and the appearance of corruption that the statutes were designed to prevent.

If the Michigan State Chamber of Commerce qualifies for the *MCFL* exception, then that exception extends to a very broad category of incorporated entities. The State Chamber is a multipurpose organization whose purposes include mutual assistance as well as the propagation of ideas. Its objectives include not only encouraging the "preservation of and enhancement of the American system of private enterprise" and informing the government of the views of the business community,[9] but also promoting "the economic development of the State of Michigan," keeping members informed about laws and regulations affecting their interests, furnishing technical and educational materials to members, and encouraging the observance of ethical business practices.[10] The organiza-

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[8] *See* Juris. Statement 16 n.13.

[9] One of the Chamber's publications states, "As Michigan's leading business advocate, the State Chamber actively speaks out on legislative, political, legal, economic and social issues that affect the business community." Michigan State Chamber of Commerce, *1985-86 Michigan Directory* 1 (1985) (Plaintiff's Trial Exhibit No. 3).

[10] By-Laws of the Michigan State Chamber of Commerce (revised April 24, 1980) (Defendants' Exhibit No. 7 at the deposition of Robert S. LaBrant); *see* Juris. Statement App. 3a.

tion "provides a wide variety of membership services—including regular and special publications, legislative briefings, group insurance, a business hot-line, and seminars—designed to help members operate effectively, profitably and responsibly." [11]

In these respects, the State Chamber of Commerce is indistinguishable from countless other trade associations, whether their membership encompasses one or many industries. Typically, one of the principal purposes of a trade association is to lobby for its members' business interests.[12] It is difficult to imagine any policy on which a lobbying group working to promote the economic interests of business corporations could not phrase its arguments largely in political or ideological terms. For example, the United States Chamber of Commerce emphasizes "free-market principles" and the "free enterprise system." [13] Privately-owned electrical utilities espouse the virtues of free enterprise; oil producers urge various measures that would increase the nation's energy independence while increasing the price of domestically produced oil; publishers and broadcasters have an interest in promoting freedom of speech; defense contractors' groups assert that national security requires increased defense spending.[14]

[11] *1985-86 Michigan Directory*, *supra* note 9, at 1.

[12] *National Trade and Professional Associations of the United States* 5, 8 (J. Russell 24th ed. 1989).

[13] *See* U.S. Chamber of Commerce, *We Believe in America and the Free Enterprise System That Made It Great* 2, 3, 12 (1984); *id.* at 2 ("If your firm is to meet the challenge of those who would handcuff free enterprise and claim more and more of your hard-earned profits, you need an ally that will fight business' fight as only the U.S. Chamber of Commerce can.").

[14] Such groups, of course, are free to communicate their views on policy issues in various ways; at issue in this case is whether they may be prohibited from making expenditures that expressly advocate the election or defeat of particular candidates for public office. *See MCFL*, 479 U.S. at 259 n.12.

Accordingly, no workable distinction can be drawn between primarily ideological entities which receive money from business corporations, and those which are primarily designed to promote business interests.[15] Instead of imposing such a time-consuming and ultimately futile task upon campaign finance enforcement agencies and state and federal courts, this Court should reaffirm the rule established in *MCFL* that independent expenditures in election campaigns may be made only by nonprofit corporations which do not receive any funds from business corporations. This prophylactic rule provides clarity and certainty in an area that would otherwise be vexed by evasions, circumventions and close questions of degree.

The flow of business corporation money through the trade association loophole opened by the Sixth Circuit's opinion is potentially massive. The Michigan State Chamber of Commerce had dues income in 1984-85 of $1.85 million. Each of the fifty states has a state chamber of commerce; these groups are affiliated with the United States Chamber of Commerce, a financially powerful nonprofit corporation whose members include

[15] *See Constitution of the National Association of Manufacturers of the United States of America*, art. II, § 1 (rev. 1985) ("The general objects and purposes for which the NAM is formed are the promotion of the industrial interests of the United States, the fostering of the domestic and foreign commerce of the United States, the advancement of private markets and sound economic growth, the promotion of a strong defense posture, the betterment of relations between employer and employees, the protection of the individual liberty and rights of the employer and employees, and the dissemination of information with respect to the principles of individual liberty and ownership of property. More particularly, the objects and purposes of said corporation are to establish and maintain a mutual and cooperative organization of American manufacturers for the fostering of their trade, business and financial interests, to reform abuses relative thereto, to secure freedom from unlawful and unjust exactions, to support or oppose legislation depending on its impact on these principles and promote a more enlarged and friendly intercourse among manufacturers.").

business corporations as well as individuals and trade associations. Virtually every industry has one or several trade associations, which are typically nonprofit corporations with corporate members. At least 750 trade associations with annual budgets exceeding $1 million have corporate members whose interests may be affected by governmental policies; of these, more than 200 have annual budgets exceeding $5 million.[16]

If the loophole remains, business corporations are virtually certain to increase the amounts of corporate money flowing to trade associations and expended for campaign purposes.[17] Currently, business corporations and incorporated trade associations must create "political action committees" (PACs) in order to participate in election campaigns at the federal level and in states which prohibit direct corporate involvement; PAC fundraising activities are subject to substantial restrictions.[18] Nearly two thousand business corporations and hundreds of trade associations have established affiliated PACs. In

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[16] Analysis of lists published in *National Trade and Professional Associations of the United States* 411-15, *supra* note 12.

[17] Trade associations and business leagues, exempted from federal income tax under 26 U.S.C. § 501(c)(6) (1982), are not required to refrain from political activity in order to preserve their tax-exempt status. *See* T. Geer, *Tax Management, Estates, Gifts, and Trusts: Exempt Organizations—Exemption Requirements* A-15 (1986).

[18] Under federal law, a PAC's administrative and fundraising expenses may be paid by its parent, 2 U.S.C. § 441b(b)(2)(C) (1982), but the PAC may solicit contributions only from a restricted class of stockholders and executive or administrative personnel of specified corporations. A PAC sponsored by a corporation may solicit the stockholders and executive or administrative personnel of its parent corporation. *Id.* § 441b(b)(4)(A)(i). The PAC of a trade association may solicit the stockholders and executive or administrative personnel of any member corporation which has given its approval, but a corporation may provide such approval to only one trade association per year. *Id.* § 441b(b)(4)(D). Individual contributions to a PAC are limited to $5000 per year. *Id.* § 441a(a)(1)(C).

the first 18 months of the 1987-88 election cycle, corporate PACs spent more than $58 million, including $36 million in contributions to candidates.[19] The size of the corporate PAC sector today gives proof of the enormous interest of business corporations in attempting to influence the political process. The loophole created by the Sixth Circuit's decision can be expected to attract even greater sums directly from corporate treasuries amassed for business purposes.

Unleashing the accumulated financial power of business corporations upon the political process, through nonprofit corporate entities, would thus create precisely the evils that federal and state legislators sought to prevent when they prohibited corporate election spending. First, such spending would create "the potential for unfair deployment of wealth for political purposes"[20]—no less unfair merely because it is channeled through an intermediary that can be controlled by business corporations. Like corporate treasury funds, trade association dues paid by member corporations are a function of business corporations' success in the economic marketplace rather than their popularity in the political marketplace.[21] Second, corporations might use their shareholders' money for political purposes that some shareholders do not sup-

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[19] Federal Election Commission, Press Release, Sept. 8, 1988, at 2. The figure of $58 million does not include spending by trade association PACs. The largest trade association PACs include the Realtors Political Action Committee (disbursements of $2.7 million in the first 18 months of 1987-88); Build Political Action Committee of the National Association of Home Builders ($1.2 million); Dealers Election Action Committee of the National Automobile Dealers Association ($950,000); California Real Estate PAC ($874,000); and the American Bankers Association BankPac ($832,000). *Id.* at 23.

[20] *See MCFL*, 479 U.S. at 259.

[21] *See id.* at 258-59.

port;[22] the shareholders' dissent is not magically eliminated by the expedient of funneling the money through two corporations instead of one.

Congress was well aware of the potential use of intermediary entities to circumvent the ban on corporate election spending, and the legislative history of the federal statute makes clear that Congress intended to ban indirect as well as direct corporate financial involvement in campaigns. During floor debate on the Taft-Hartley Act in 1947, Senator Robert Taft was asked whether the National Association of Manufacturers or the United States Chamber of Commerce would be prohibited, "out of funds contributed by corporations into the general fund of the association, from buying newspaper space to advocate or oppose a candidate for public office. . . ." Senator Taft responded, "Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal."[23]

Such legislative judgments regarding the scope of the prohibition necessary to prevent political use of money amassed for business purposes, made by Congress and twenty state legislatures, are entitled to substantial deference from the courts.[24]

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[22] *Id.* at 258; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982).

[23] 93 Cong. Rec. 6438 (1947).

[24] *See FEC v. National Right to Work Comm.*, 459 U.S. at 210 ("we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

CONCLUSION

For the foregoing reasons, Common Cause believes that the decision of the United States Court of Appeals for the Sixth Circuit should be reversed. Accordingly, the Court should note probable jurisdiction in this case.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE FEDERAL ELECTION COMMISSION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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INTEREST OF THE AMICUS CURIAE

The Federal Election Commission ("FEC" or "the Commission") is the independent agency established by Congress to administer and "formulate policy with respect to" the Federal Election Campaign Act of 1971, as amended ("FECA"), *codified* at 2 U.S.C. §§ 431-455. *See* 2 U.S.C. § 437c(b)(1).[1] The Com-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Elec-

mission is authorized to appear and defend against actions with regard to the administration and enforcement of the FECA, as well as the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. *See* 2 U.S.C. § 437d(a)(6); 26 U.S.C. §§ 9010, 9040. This brief is submitted in support of the Appellants pursuant to Supreme Court Rule 36.4.

The Commission is vested with "exclusive jurisdiction" over the administration and civil enforcement of the FECA. 2 U.S.C. § 437c(b)(1). Sections 437g(a)(1)-(a)(4) set out a detailed administrative procedure by which the Commission determines if there is probable cause to believe that a person has violated the FECA. Upon completion of those administrative proceedings, if the Commission is unable to resolve a matter through conciliation, it is authorized to bring a *de novo* civil suit to enforce the law in the appropriate district court. 2 U.S.C. § 437g(a)(6)(A). In addition to civil enforcement, the Commission promulgates regulations, 2 U.S.C. § 438(d), and issues formal advisory opinions in response to requests by any person relating to specific transactions or activities under the FECA. 2 U.S.C. § 437f(a)(1).

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tion Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357, and by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 662, 663 (June 27, 1988).

The FECA generally prohibits any corporation from using its corporate treasury funds to make "a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a). However, the FECA permits a corporation to use its corporate treasury funds to administer a separate segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Separate segregated funds are defined as political committees by the FECA, 2 U.S.C. § 431(4)(B), and like other political committees are subject to recordkeeping and reporting requirements. *See* 2 U.S.C. §§ 432-434. The corporation itself can direct the making of contributions and expenditures from this fund. *See Pipefitters v. United States*, 407 U.S. 385, 413-426 (1972). Contributions to a separate segregated fund may be solicited only from the corporation's stockholders, executive and administrative personnel and their families, and, if a membership corporation, from members. 2 U.S.C. § 441b(b)(4).

In *FEC v. Massachusetts Citizens For Life* (*"MCFL"*), 479 U.S. 238 (1986), this Court addressed a nonprofit corporation's First Amendment challenge to the FECA's requirement that corporate election expenditures be financed through separate segregated funds. The Court determined that this requirement could not constitutionally be applied to MCFL because the purposes of the statute were inapplicable to MCFL's particular characteristics. The Court specified that MCFL had three features that were essential to its holding, one of which was that MCFL had not been established by a business corporation and had a firm policy against accepting money from business corporations. 479 U.S. at 264.

The instant case concerns a First Amendment challenge, brought by the Michigan State Chamber of

Commerce ("the State Chamber"), to Mich. Comp. Laws ("MCL") § 169.254(1), a provision of the Michigan Campaign Finance Act ("the Michigan Act") which, like 2 U.S.C. § 441b, requires that corporations finance political contributions and expenditures through separate segregated funds.[2] The court below determined that section 54(1) of the Michigan Act is modeled on the FECA and that this Court's analysis in *MCFL* regarding 2 U.S.C. § 441b is, therefore, applicable to section 54(1) (J.S. App. 13a n.3).[3] The court then held that the *MCFL* decision made it unconstitutional to apply section 54(1) to the State Chamber's election expenditures, even though more than 75% of the State Chamber's treasury consisted of funds received from its business corporation members (J.S. App. 24a-28a).

The Commission has a vital interest in this case because the lower court's decision erroneously expands the impact of this Court's ruling in the *MCFL* case

[2] Section 54(1) of the Michigan Act prohibits a corporation from making, *inter alia*, independent expenditures "in assistance of, or in opposition to the nomination or election of a candidate" for state office. MCL §§ 169.254(1), 169.206(1). However, it permits a corporation to establish a separate segregated fund, MCL § 169.255(1), and solicit contributions to that fund from a restricted class including stockholders, officers, directors, managerial and administrative personnel and their spouses, and members of a membership corporation who are individuals. MCL §§ 169.255(3)(a)-(d). A separate segregated fund under the Michigan Act is required to report as a political committee or independent committee. MCL §§ 169.208(2), 169.211(2).

[3] "J.S. App. ——" references are to the consecutively numbered pages of the Appendix to the Jurisdictional Statement filed in this Court. "C.A. App. ——" references are to the pages of the Joint Appendix filed in the court of appeals.

on the constitutionality of the FECA, and will seriously interfere with the Commission's ability to enforce the FECA.

STATEMENT OF THE CASE

The State Chamber is a nonprofit Michigan corporation established in 1959 to serve the interests of the Michigan business community. More than 75% of the State Chamber's 8,000 members are business corporations (J.S. App. 3a, 41a). It is funded primarily by annual dues which its corporate and noncorporate members are required to pay (J.S. App. 23a).

In June 1985, the State Chamber decided to place a paid advertisement in the *Grand Rapids Press* in support of a candidate in a primary election for the Michigan House of Representatives (J.S. App. 4a, 42a-43a). Although the State Chamber's separate segregated fund, the Michigan State Chamber of Commerce Political Action Committee, had ample funds to pay for the advertisement in compliance with the Michigan Act,[4] the State Chamber decided it wanted to pay for the advertisement with funds from its corporate treasury instead (J.S. App. 6a-7a). Anticipating that its proposed activities would be found in violation of the Michigan Act, the State Chamber brought this action seeking a declaration that section 54(1) was unconstitutional and an injunction against its enforcement (J.S. App. 4a, 43a).

The court of appeals concluded that this case was controlled by this Court's holding in *FEC v. Massa-*

[4] The State Chamber's separate segregated fund projected having over $140,000 to spend in the 1986 elections (C.A. App. 164).

chusetts Citizens for Life, 479 U.S. 238 (1986), that the similar federal prohibition of corporate election expenditures could not constitutionally be applied to the corporation at issue in that case. The court below acknowledged that the State Chamber receives more than 75% of its funding from business corporations (J.S. App. 25a) and it also noted that one of the three features identified by this Court as essential to its holding was that MCFL did not accept contributions from business corporations (J.S. App. 24a). The court nevertheless decided that the State Chamber was covered by the *MCFL* holding because the Michigan Act's requirements for reporting independent expenditures ensured that the Chamber's expenditures from the funds provided by its corporate members would not be "undisclosed" (J.S. App. 25a-26a).

ARGUMENT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRECEDENT AND WILL SERIOUSLY UNDERMINE THE LONGSTANDING STATUTORY PROHIBITION ON CORPORATE ELECTION EXPENDITURES

In *FEC v. Massachusetts Citizens for Life* (*"MCFL"*), 479 U.S. 238 (1986), a closely divided Court held that the First Amendment precluded application of 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act, to require a small, informally organized, incorporated advocacy group to finance its independent expenditures in connection with federal elections from a separate segregated fund. The Court concluded that requiring such a group to undertake the formal organization necessary to operate a separate segregated fund might impermissibly discourage it from engaging in protected

campaign speech. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 254-255. However, the Court carefully limited the reach of its decision, describing as "essential" to its ruling the fact that MCFL had not been established by a business corporation and had a firm policy against accepting money from business corporations. *Id.* at 263-264.

Relying exclusively upon this Court's decision in *MCFL*, the court below found it unconstitutional to apply section 54(1) of the Michigan Campaign Finance Act, which was modeled on 2 U.S.C. § 441b, to the Michigan State Chamber of Commerce—a corporation that receives at least 75% of its money from the business corporations that make up the bulk of its membership, whose primary purpose is serving the interests of business, and which operates a separate segregated fund that has long been a potent force in Michigan electoral politics. This decision would permit virtually any trade association or other nonprofit group established by business corporations to freely spend any funds received from its corporate members to affect candidate elections. This would nullify the explicit limitations this Court placed upon its decision in *MCFL* and open an avenue through which virtually unlimited amounts of business corporation money could be diverted to electoral campaigns.

The decision of the court of appeals conflicts with the construction of the *MCFL* opinion adopted by the Federal Election Commission, the expert agency created by Congress to administer the federal campaign finance laws that were the subject of that opinion, and of a federal district court.[5] It would substan-

[5] *See* Advisory Opinion 1987-7, 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5889 (April 6, 1987). ("The Court qualified

tially undermine congressionally mandated limitations upon the use of corporate wealth to influence the outcome of federal elections which have been in effect for more than 40 years. Indeed, the legislative history reflects specific Congressional intent to bar business associations like chambers of commerce from serving as conduits for business corporation funds.[6]

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its exemption for MCFL by setting out 'three features essential to' its holding. One feature was the fact that MCFL's policy is not to accept contributions from business corporations or labor unions. You have stated, however, that your membership does include corporations and that you accept corporate contributions as permitted by your bylaws . . . . As a result, USDC clearly fails to satisfy the MCFL standard for exemption from the expenditure prohibition of section 441b and is still subject to that provision."); *United States Defense Committee v. FEC*, No. 84-CV-450 (N.D.N.Y. April 27, 1988) (unpublished order) ("[T]he decision [in *MCFL*] does not protect [USDC] because [USDC], one, receives funds from corporations; and, two, . . . its membership includes other corporations which contribute to [USDC's] treasury. In this [c]ourt's judgment, the proposed activities of the U.S. Defense Committee squarely fall within Section 441[b], and the U.S. Defense Committee is a corporation which is not protected by the recent U.S. Supreme Court decision.") (App. 4a) (A copy of this opinion is included in the Appendix at the back of this brief.), *vacated on other grounds*, 861 F.2d 765 (2d Cir. 1988). Two other nonprofit corporations that accept funding from business corporations have raised defenses based upon this Court's decision in *MCFL* in pending lawsuits to enforce 2 U.S.C. § 441b. *FEC v. National Organization for Women, Inc.*, No. 87-2269 (D.D.C. filed August 14, 1987); *FEC v. National Rifle Association*, No. 85-1018 (D.D.C. filed March 29, 1985).

[6] During the Senate debates on the original statutory ban on corporate election expenditures, Senator Taft repeatedly confirmed this intention.

> Such an association could receive money by direct contributions from individual members, just as the CIO-PAC can properly operate as a political organization, raising its funds from individual members. In the same way the National Manufacturers Association could do the same thing. But no corporation could contribute to the National Manufacturers Association. . . .
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> * * * *
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> Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal. In any event, so long as the money comes from corporations, and with their knowledge, I think it would be clearly illegal anyway, and they would be participating as corporations in spending for political purposes.
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> * * * *
>
> [I]f an association of manufacturers accepts contributions from corporations and others that violate the laws by making contributions for political purposes, I think it will be an accessory with those corporations and will be liable under the act.

93 Cong. Rec. 6438, 6447 (1947) *reprinted in* II NLRB, *Legislative History of the Labor Management Relations Act, 1947* at 1530, 1531, 1548 (1948).

[7] We agree with the Appellants that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(2), since the recent amendment of that provision was not effective until after the decision was rendered in this case. However, even if the Court finds that jurisdictional provision inapplicable, the legislative history of the amendment indicates that Congress expected the Court to continue to review, on writ of *certiorari*, decisions which invalidate Acts of Congress. H.R. Rep. No. 100-660, 100th Cong., 2d Sess. at 11, n.24 (1988). Although the appellate court here did not rule directly on the constitutionality of a federal statute, section 54(1) of the Michigan Act was modeled on 2 U.S.C. § 441b, and the court of appeals decision was an application

Such significant inroads in a statute Congress has for so many years found necessary to protect the integrity of candidate elections should not be permitted without plenary review by this Court.[7]

A. Section 54(1) Of The Michigan Campaign Finance Act Does Not Restrict The State Chamber's Political Speech

In *FEC v. Massachusetts Citizens for Life*, a majority of this Court concluded that the administrative and financial burdens of establishing and maintaining a separate segregated fund to finance election expenditures were substantial enough to discourage some small informal organizations like the one in that case from engaging in political speech at all.

> [S]uch duties require a far more complex and formalized organization than many *small groups* could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech . . . . Faced with the need to assume a more sophisticated organizational form . . . and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

479 U.S. at 254-255 (emphasis added). For these reasons, the Court concluded that the statute's "practical effect on MCFL in this case is to make engaging in protected speech a severely demanding task." *Id.* at 256.[8]

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of a ruling by this Court on the constitutionality of that provision. Since the lower court's decision effectively calls the constitutionality of the federal statute into question, there is ample reason for the Court to grant a writ of *certiorari*. *See Heckler v. Edwards*, 465 U.S. 870, 882-884 (1984).

[8] This opinion also listed among the administrative burdens on MCFL's speech the Act's requirements that separate

None of these concerns are applicable to the State Chamber. The State Chamber is a state-wide organization that has been in existence since 1959. Unlike MCFL, which was funded by voluntary donations, the State Chamber has a steady source of financial support from the dues which its 8,000 members are required to pay to obtain the many benefits of membership. More importantly, the State Chamber has been operating a sizable separate segregated fund since 1977 (J.S. App. 42a), and there is no evidence that it has been unable to publicize its political views adequately through the political expenditures it has made from that fund in every election since 1977.[9] To the contrary, the State Chamber has been highly successful in the electoral activities financed through its separate segregated fund, and most of the candidates it has supported in recent years have won

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segregated funds, like other political committees, "adopt specific accounting procedures" and "file periodic detailed reports." 479 U.S. at 255. However, only four Justices joined in this portion of the opinion, and Justice O'Connor filed a separate concurring opinion to make clear her view that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." *Id.* at 266. Accordingly, a majority of the Court rejected the suggestion in the plurality opinion that the Act's recordkeeping and disclosure requirements could be a cognizable burden on MCFL's First Amendment rights.

[9] The State Chamber has an eligible class of approximately 50,000 individuals from which it can solicit contributions to its separate segregated fund under the Michigan Act (C.A. App. 179) and it has been quite successful in doing so. During the 1983-84 election cycle, the separate segregated fund raised over $102,000 and it projected having more than $140,000 to spend in the 1986 primary and general elections (C.A. App. 164, 184).

(J.S. App. 66a-67a). Indeed, the Chamber's success and expertise in operating a separate segregated fund is so well recognized that other corporations and chambers of commerce have turned to it for assistance and instruction in how to form and operate separate segregated funds (C.A. App. 180-184).

In short, in contrast to MCFL, the State Chamber is a large, formally organized corporation which has *already* adopted all of the organizational forms required to successfully finance its political speech through a separate segregated fund. Since the State Chamber is not the kind of corporation whose political speech could be inhibited because of its "inability to form" a separate segregated fund, *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 255 n.8, there is no basis for finding that the Michigan statute violates its First Amendment rights.

B. Compelling State Interests Are Served By Application Of Section 54(1) To The State Chamber

In *MCFL*, this Court acknowledged that section 441b's regulation of election expenditures by most corporations serves the substantial governmental interest in maintaining the integrity of candidate elections. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 256-259. Reaffirming the need to curb the use in elections of "the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,'" which it had already found compelling in *FEC v. National Right to Work Committee*, 459 U.S. 197, 207 (1982), the Court explained in *MCFL* that "the corrosive influence of concentrated corporate wealth" could threaten "the integrity of the marketplace of political ideas."

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. . . . The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

FEC v. Massachusetts Citizens for Life, 479 U.S. at 257-258. By requiring corporations to finance their spending from separate segregated funds made up of voluntary individual contributions for political purposes, the Court said, "§ 441b seeks to prevent this threat to the political marketplace." *Id.* at 258.[10]

The Court majority ultimately found that 2 U.S.C. § 441b could not constitutionally be applied to MCFL because "the concerns underlying the regulation of corporate political acivity are simply absent with regard to MCFL." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 263. Observing that "the class of organizations affected by our holding today" may be "small," the Court carefully set out three features of MCFL that it specified as "essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264. One of these features was that MCFL had not been established by a business corporation and it had a firm policy against accepting contributions from business corporations. "This prevents such corporations

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[10] Congress's explicit determination (*see Pipefitters v. United States*, 407 U.S. at 429-431 (*quoting* 117 Cong. Rec. 43,381 (1971))) that the regulations now contained in section 441b are an appropriate way to attain important governmental objectives in light of the applicable constitutional concerns "warrants considerable deference" from this Court. *FEC v. National Right to Work Committee*, 459 U.S. at 209.

from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 264. This criterion reflects the intention expressed by Congress when the ban on corporate expenditures was first enacted, that business associations not be able to convert their corporate members' dues into political expenditures that those corporations themselves would be prohibited from making. See p. 8, n.6, *supra.*

The State Chamber clearly fails to satisfy this criterion. The State Chamber not only accepts money from business corporations but most of its membership consists of corporations. Indeed, the court of appeals acknowledged that 75% of the State Chamber's treasury funds come from business corporations (J.S. App. 25a). Moreover, the State Chamber appears to have been established at least in part by business corporations (J.S. App. 20a), and its primary purpose of existence is to serve the interests of business (J.S. App. 41a). Thus, the State Chamber represents precisely the sort of conduit for business corporation funds that this Court was at pains to exclude from its ruling in *MCFL.* As Judge Merrit said in his dissent from the denial of rehearing *en banc* below (J.S. App. 35a-36a) (emphasis in original):

> The panel . . . describes the Chamber as "comprised of about eight thousand voluntary members, approximately *seventy-five percent of whom are corporations. . . .*" Thus, the panel—without recognizing it—characterized the Michigan Chamber so as to place it outside the narrow exception carved out by the Supreme Court. . . . [T]he Michigan Chamber of Commerce may now act as a conduit for large sums of money contributed by its corporate members—General Motors, Ford, Chrysler, etc.—in support of the corporations' favorite candidates.

The appellate court's suggestion (J.S. App. 25a-26a) that the Michigan Act's reporting requirements satisfy this concern is simply wrong. In *MCFL,* 479 U.S. at 262, this Court discussed at length the comparable reporting requirements contained in the federal statute, yet it still found MCFL's policy against accepting funds from business corporations to be essential to its holding. Requiring the State Chamber to report its election expenditures would do nothing to prevent it from *acting* as a conduit for corporate funds, because money the State Chamber receives from its corporate members would still be used to fund those expenditures. It was MCFL's clear inability to *act* as a conduit because it would accept no corporate funds that this Court found crucial to its conclusion that the FECA's purposes were inapplicable.

In sum, section 54(1) has been carefully limited to restricting only the use of a corporation's treasury funds to influence Michigan elections. Through its separate segregated fund, a corporation can make independent expenditures communicating to the public the corporation's support for, or opposition to, any candidate and this requirement has not inhibited the State Chamber from effectively supporting the candidates of its choice. In fact, section 54(1) would not prohibit the State Chamber's proposed independent expenditure in this case, so long as it is financed from the separate segregated fund, which had more than sufficient funds to do so. In addition, because its treasury is made up in part of funds received from business corporations, application of section 54(1) to the State Chamber serves legislative interests this

Court has previously recognized as substantial. There is, therefore, ample reason for this Court to review the erroneous decision of the court of appeals that this important statute, designed to protect the integrity of the electoral process, cannot be applied to corporations like the one in this case.

CONCLUSION

The Court should note probable jurisdiction in this case and set it for briefing and argument on the merits.

Respectfully submitted,

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April 12, 1989

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

84-CV-450

UNITED STATES DEFENSE COMMITTEE, PLAINTIFF,

-against-

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS.

Proceedings in the above-entitled matter, 1. Plaintiff's Motion for Summary Judgment; 2. Defendant's Motion to Dismiss, came on before the United States District Court, Northern District of New York, at the U.S. Post Office and Courthouse, Broadway, Albany, New York, on Friday, April 1, 1988, before Hon. Con. G. Cholakis, District Court Judge.

DECISION

THE COURT: Please be seated.

The Court has reviewed all the papers that have been submitted to it. It has listened with a great deal of interest to the arguments presented to the Court, and the Court recognizes, assumes that the litigants in this matter are probably expecting a lengthy learned decision to be handed down. Off the record.

(Off the record discussion.)

THE COURT: On the record. The Court is also aware of the time constraints within which this matter is brought before it, although at first blush it must confess that since this was a matter that was commenced in the year 1984 that the time constraints should not influence and control the Court's actions.

However, the Court has given a great deal of thought to this matter and believes that it can distill all the arguments into two or three relatively simple steps.

1. The Court must determine whether or not it has jurisdiction to determine the dispute between the parties.

The Defendants allege that the jurisdiction of the Court is extremely limited, that Congress has set forth precisely under what situations or what circumstances the litigant can come into Court for review of the FEC's determinations, and that this procedure does not come—this matter does not come within those deliniated in the FECA.

The Court recognizes that the proceeding that has been brought by the Plaintiff or the Plaintiffs is not deliniated within FECA. However, the Court is of the opinion that it has broad powers to review matters that are conducted or performed by various federal agencies, and unless the Court's power is explicitly restricted by statute or by Congress, that the Court's jurisdiction is not limited.

In this case, while the Congress has deliniated several types of controversies that could specifically go to Court, it has not limited what the Court perceives as its authority to review, and the Court determines that it has the power to entertain the proceeding which has been brought before it.

Once having determined that it has the power, it must review some of the arguments which have been advanced. While it was not orally advanced in the Court, the papers indicate that the Plaintiffs felt that they did not receive the equal protection under the 14th Amendment because the statute specifically exempted from its prohibition the institutionalized press.

The Court is of the opinion that the exemption of the institutionalized press from the prohibition of 441-B has a valid basis in that the public has a need to know the issues which surround these federal election campaigns; and, further, the equal protection argument must fall because it is clear that the statute does apply to the institutionalized press when they exceed or go outside their legitimate press function.

It is, therefore, this Court's judgment, that the equal protection argument of the Plaintiffs must fall.

It is also clear from reading Section 441-B that it is unlawful for any corporation whatever to make expenditure in connection with any election at which —presidential and vice-presidential election—or senators or representatives in Congress are to be voted for.

The portions that I have just read into the record are only those portions which I feel are applicable to this case. We must now determine what it is that the Plaintiff corporation seeks to do.

It is clear from all papers presented that it is the intent of the Plaintiff to send out certain correspondence—intends to send out correspondence to the general public identifying various candidates for public office and pointing out those candidates who agree with the principles advocated by the Plaintiff, and

to point out those candidates who advocate principles different than the Plaintiff's principles. The Plaintiff would say that unless there is an explicit request in this correspondence that the recipient of the letters vote one way or another, that it is not in effect electioneering.

The Court cannot accept the Plaintiff's position, and it is clear from the arguments presented and the papers submitted that what it is that the Plaintiff intends to do does come within the prohibition of 441-B.

The Court must now determine whether the recent decision by the U.S. Supreme Court in the case of the *Federal Election Commission vs. Citizens for Life* gives the Plaintiff any protection.

It is clear that in that case, the U.S. Supreme Court said that this activity would not be prohibited in certain instances.

In this Court's judgment the decision does not protect the Plaintiff because the Plaintiff, one, receives funds from corporations; and, two, pursuant to the stipulations submitted to the Court, Page 4, Subdivision 9, clearly indicates that its membership includes other corporations which contribute to the Plaintiff's treasury.

In this Court's judgment, the proposed activities of the U.S. Defense Committee squarely fall within Section 441-B, and the U.S. Defense Committee is a corporation which is not protected by the recent U.S. Supreme Court decision.

Therefore, Defendant's motion to dismiss is in all respects granted.

MS. KLEIN: Thank you, your Honor.

THE COURT: My law clerks have lived with this for the last several days, and at least one

of them indicates that it is not—and I assume correct—that it is not granting the motion to dismiss. It is granting the summary judgment motion of the Defendant; and, Ms. Klein, I request you submit an appropriate order for my signature.

MS. KLEIN: I will, your Honor.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

APPENDIX B

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchapter 1—Disclosure of Federal Campaign Funds

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers con-

cerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or

anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders

or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

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Supreme Court, U.S.
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No. 88-1569

IN THE SUPREME COURT OF
THE UNITED STATES
October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED ON MARCH 10, 1989
PROBABLE JURISDICTION NOTED ON MAY 1, 1989

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 24, 1985	Plaintiff's Complaint filed with the U.S. District Court for the Western District of Michigan, Southern Division
May 24, 1985	Plaintiff filed Motion for Preliminary Injunction
May 31, 1985	Hearing on Plaintiff's Motion for Preliminary Injunction
June 24, 1985	Order entered denying Motion for Preliminary Injunction
February 10, 1986	Defendants filed Motion for Summary Judgment
April 7, 1986	Hearing on Defendants' Motion for Summary Judgment
May 7, 1986	Amended Order denying Defendants' Motion for Summary Judgment
May 9, 1986	Plaintiff filed Motion for Leave to Amend Complaint
May 9, 12 and June 12-13, 1986	Non-Jury Trial
June 13, 1986	Order entered granting Plaintiff's Motion to Amend Complaint
September 3, 1986	Judge Hillman's Opinion and Judgment were entered upholding constitutionality of the involved statute
September 17, 1986	Plaintiff's Notice of Appeal filed with the U.S. Court of Appeals for the Sixth Circuit

September 15, 1988	Opinion of the U.S. Court of Appeals for the Sixth Circuit
September 29, 1988	Defendants-Appellants filed Petition for Rehearing En Banc with the U.S. Court of Appeals for the Sixth Circuit
December 14, 1988	Order of the U.S. Court of Appeals for the Sixth Circuit denying Petition for Rehearing En Banc
December 27, 1988	Amended Order entered by the U.S. Court of Appeals for the Sixth Circuit denying Petition for Rehearing En Banc
March 3, 1989	Filing of Defendants-Appellants Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit
May 1, 1989	Probable Jurisdiction noted

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, **Plaintiff,** **v** **RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,** **Defendants.**	**Case No. G85-496 CA** **Douglas W. Hillman** **U.S. District Judge**

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES the Plaintiff by and through its counsel, DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG, and for its Complaint against the Defendants for Declaratory and Injunctive Relief, states as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff, Michigan State Chamber of Commerce, (the "State Chamber"), is a non-profit Michigan corporation which represents the interests and views of over 8000 private Michigan corporations and businesses engaged in civic, professional, commercial, industrial, agricultural and recreational enterprises, having its principal office located in the

City of Lansing, County of Ingham, State of Michigan.

2. Defendant, Richard H. Austin, is the State of Michigan Secretary of State, a constitutional state officer, who is charged with the administration and enforcement of the Campaign Finance Act, 1976 PA 388, as amended; MCLA 169.201 *et seq.* ("Act 388") and whose principal office is located in the City of Lansing, County of Ingham, Michigan.

3. Defendant, Frank J. Kelley, is Attorney General for the State of Michigan, a constitutional state officer, who is the principal law enforcement officer of the state, charged by law with the enforcement of Act 388, and whose principal office is located in the City of Lansing, County of Ingham, State of Michigan.

4. Jurisdiction is based on 28 USC 1331 and 28 USC 2201 for the reason that this action arises under the First and Fourteenth Amendments to the Constitution of the United States. This action also arises under Article 1, §§1, 2, 3 and 5 of the Michigan Constitution of 1963.

GENERAL ALLEGATIONS

Declaratory Relief-Actual Controversy

5. On or about December 30, 1976, the State of Michigan enacted Act 388 to, among other things, regulate political activity, campaign financing, campaign contributions and expenditures, anonymous contributions and campaign advertising and literature.

6. Section 54 of Act 388 prohibits public statements made by a corporation, or its officers, directors, stockholders, attorneys or agents acting for the corporation, to inform

the public of its views on important issues and debate concerning the nomination or election of a candidate for an elective office, when those statements require the making of independent expenditures. A person who knowingly violates this prohibition is guilty of a felony punishable by a fine of not more than $5,000 or imprisonment for not more than 3 years, or both, and if the person is other than an individual, the person may be fined up to $10,000.

7. Section 6(1) of Act 388 defines an "expenditure" to mean, in pertinent part: "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate".

8. Section 9(1) defines "independent expenditure" to mean "an expenditure as defined in section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee".

9. Because of their very nature, participation in public discussion on important issues and debate by corporations necessarily involves the making of "independent expenditures", as that term is defined in Act 388. Section 54, therefore, prohibits the participation of corporations and their officers, directors, stockholders, attorneys or agents acting for the corporation, in the public debate and discussion concerning the nomination or election of a candidate.

10. Act 388 does not place any similar prohibition or limitations on public statements on important issues and debate made by individuals, partnerships, unincorporated associations, labor organizations, or other legal entities or persons in the assistance of, or in opposition to, the nomination or election of candidate for political office.

11. The effect of Section 54 of Act 388 is to deny corporations, including the Plaintiff and its member corporations, the opportunity to actively participate in the public discussion of important issues and debate during the election process while authorizing and encouraging other noncorporate business entities, labor organizations, associations, and persons to participate without limitation or prohibition.

12. On or about June 10, 1985, a special election will be held for the Michigan House of Representatives 93rd Legislative District (the"Special Election") to fill a vacancy caused by the resignation of the incumbent.

13. The ability of Plaintiff and its member corporations to timely participate in the public discussion of important issues and debate concerning the Special Election has been absolutely precluded by Section 54 of Act 388 under threat of criminal felony prosecution.

14. Plaintiff has approved and will make a public statement by purchasing a one-quarter page advertisement in the Grand Rapids Press in support of Richard Bandstra, a candidate in the Special Election, but only if it is not subject to the felony provisions under Section 54.

15. Unless Plaintiff can engage in such activity in advance of the Special Election, it will be effectively precluded from timely participation in said election. The deadline for placing and paying for the advertisement is Wednesday, June 5, 1985 at 12:00 o'clock noon. See Affidavit of E. James Barrett, attached hereto as Exhibit "A" and incorporated herein by reference.

16. Plaintiff, therefore, requires declaratory relief in order to fully adjudicate its rights, duties, obligations, and immunities and those of its member corporations under the First and Fourteenth Amendments of the United States Constitution and Article 1, §§1, 2, 3, and 5 of the Michigan Constitution of 1963.

17. Declaratory relief is necessary to guide the present and future conduct of the Plaintiff and its member corporations and to preserve their rights under the Constitution and laws of the United States and the State of Michigan, particularly with respect to the pending Special Election.

Preliminary Injunctive Relief

18. Further, without a preliminary injunction against the enforcement of Section 54 of Act 388 with respect to independent expenditures, Plaintiff and its member corporations are left with making the impossible choice of (1) exercising their constitutional rights and risking threatened felony prosecutions, with the attendant criminal fines and imprisonment; *or* (2) obeying the prohibition contained in Act 388 and suppressing their constitutional rights, thereby foregoing any fair or meaningful participation in the Special Election.

19. Plaintiff and its member corporations desire to exercise their rights and to timely, effectively and fairly participate in the Special Election as well as other elections held in the State of Michigan.

20. Without an injunctive order preliminarily restraining and enjoining the enforcement of the prohibition of corporate independent expenditures contained in Section 54 of Act 388, Plaintiff and its member corporations will suffer and incur immediate and irreparable harm and damage through the suppression of their constitutional rights and

their ability to fully and fairly participate in the democratic election process, particularly with respect to the pending Special Election.

21. Defendants will suffer no harm through an injunctive order restraining the enforcement of the prohibition of corporate independent expenditures contained in Section 54 of Act 388 pending judicial resolution of this matter.

COUNT I

First Amendment - Free Expression and Association Rights

22. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraph 1 through 21.

23. The prohibition against independent expenditures by corporations contained in Section 54 of Act 388 impermissibly burdens Plaintiff's and its corporate members' constitutional rights to freely speak, write, express, and publish their views on all subjects as guaranteed by US Const, Am I, and Mich Const 1963, Art 1, §§1, 3 and 5.

24. The restrictions on the ability of Plaintiff and its corporate members to make public statements promoting or opposing the candidate of their choice fails to serve any substantial governmental interest, including the avoidance of either the reality or the appearance of corruption in the election process.

25. The prohibition on corporate independent expenditures contained in Section 54 of Act 388, and the Act's failure to so restrict labor organizations, partnerships, associations, and other persons clearly gives to one side of a debatable public question an advantage in expressing their views to the public, thereby clearly offending the free expression guarantees of corporate persons.

26. Plaintiff will make a public statement in support of Richard Bandstra, a candidate in the Special Election if Plaintiff will not be subject to criminal felony prosecution under Section 54. See affidavit of E. James Barrett attached as Exhibit "A".

27. Violations of Section 54 of Act 388 constitute felonies which are punishable by criminal fines and imprisonment.

28. Plaintiff and its member corporations require adjudication of the validity of Section 54 of Act 388 vis-a-vis its prohibition on corporate independent expenditures in order to guide their conduct and to preserve their rights as guaranteed by the state and federal constitutions.

29. Further, Plaintiff and its corporate members are justly fearful that if the Court does not enjoin enforcement of Section 54 of Act 388 as to corporate independent expenditures during the pendency of this action, they will be precluded from fully and fairly participating in the Special Election and any succeeding election, thereby suffering and incurring immediate and irreparable harm and damage.

COUNT II

Equal Protection of the Laws

30. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 29, as set forth above.

31. Act 388 does not place any prohibition or other limitations on public discussion by individuals, partnerships, labor organizations, unincorporated associations, or other legal entities or persons.

32. The statutory prohibition against corporate independent expenditures impermissibly discriminates against Plaintiff and its corporate members in the enjoyment of their civil and political rights, without a compelling state interest therefor, in violation of their rights to the equal protection of the laws as guaranteed by US Const, Am XIV, and Mich Const 1963, Art 1, §2.

33. Even if a compelling state interest could be served by some limitation on corporate independent expenditures, the absolute prohibition set forth in Section 54 of Act 388 is not narrowly tailored to meet any such interest, being both over-inclusive and under-inclusive.

34. Enforcement of the prohibition on corporate independent expenditures gives unfair advantage to labor organizations and other unincorporated entities in expressing their views to the people regarding important and debatable public questions.

35. Plaintiff and its corporate members require adjudication of the validity of Section 54 of Act 388 vis-a-vis its prohibition on corporate independent expenditures in order to guide their conduct and to preserve their rights as guaranteed by the state and federal constitutions.

36. Further, Plaintiff and its corporate members are justly fearful that if the Court does not enjoin enforcement of Section 54 of Act 388 as to corporate independent expenditures during the pendency of this action, they will be precluded from fully and fairly participating in the Special

Election and any succeeding election, thereby suffering and incurring immediate and irreparable harm and damage.

RELIEF REQUESTED

WHEREFORE, Plaintiff, on behalf of itself and its members, prays this Honorable Court to:

A. Declare and adjudge its rights as follows:

(1) That the Act 388 prohibition on corporate independent expenditures made in the assistance of, or in opposition to, the nomination or election of a candidate for elective office, is unconstitutional, void and of no force or effect as violative of corporations' rights of free expression and association as guaranteed by US Const, Am I, and Mich Const 1963, Art 1, §§1, 3 and 5; and

(2) That the Act 388 prohibition on corporate independent expenditures made in the assistance of, or in opposition to, the nomination or election of a candidate for elective office is unconstitutional, void and of no force or effect as violative of corporations' rights to the equal protection of the laws as guaranteed by US Const, Am XIV and Mich Const 1963, Art 1, §2;

B. Permanently enjoin the enforcement of Section 54 of Act 388 with respect to corporate independent expenditures.

C. Preliminarily enjoin the enforcement of Section 54 of Act 388 with respect to corporate independent expenditures during the pendency of these proceedings.

D. Grant such other and further relief as the Court deems consistent with equity and good conscience.

MICHIGAN STATE CHAMBER
OF COMMERCE
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DATED: MAY 24, 1985

VERIFICATION OF COMPLAINT

/s/ E. James Barrett
E. James Barrett

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss

On this 23 day of May, 1985, before me, a Notary Public, in and for said county personally appeared E. James Barrett, President, Michigan State Chamber of Commerce, Plaintiff herein, and duly authorized to act for the same, being first duly sworn, deposes and says that he has read the foregoing Verified Complaint for Declaratory and Injunctive Relief and that the same is true of his own knowledge and belief.

/s/ Debra K. Merrill
Notary Public, Ingham County,
Michigan
My Commission Expires: 9/15/87

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN STATE CHAMBER OF COMMERCE,
a non-profit Michigan corporation,
Plaintiff,

v

RICHARD H. AUSTIN, Michigan Secretary
of State, and FRANK J. KELLEY,
Michigan Attorney General,
Defendants.

AFFIDAVIT OF E. JAMES BARRETT

STATE OF MICHIGAN }
COUNTY OF INGHAM } ss

E. JAMES BARRETT, being first duly sworn, deposes and says that if called to testify in the above-captioned matter, he can state the following based upon personal knowledge:

1. I am President and Chief Executive Officer of the Plaintiff Michigan State Chamber of Commerce ("State Chamber").

2. The State Chamber of Commerce is a Michigan non-profit corporation, which represents the views of Michigan's business community. More than 75% of the State Chamber's nearly 8,000 members are corporations.

3. As President and Chief Executive Officer of the State Chamber, I am authorized to make expenditures from the State Chamber treasury in order to publicly express its views

and the views of its members on social, civic, economic, and political issues.

4. On June 10, 1985 a Special Election will be held to fill the vacancy in the 93rd Michigan State House District created by the resignation of the incumbent. Richard Bandstra is a candidate for that office.

5. The State Chamber will purchase a one-quarter page advertisement in the *Grand Rapids Press* to run on Sunday, June 9, 1985 to publicly express its support of the election of Richard Bandstra as State Representative for the 93rd District if the State Chamber will not be subject to the criminal felony provisions contained in Section 54 of the Michigan Campaign Finance Law, MCLA 162.254 (hereafter "Section 54") for the purchasing of the advertisement.

6. The Grand Rapids Press has informed the State Chamber that the deadline for placing and paying for the advertisement is Wednesday, June 5, 1985 at 12:00 o'clock noon.

7. The advertisement will not be made at the direction of, or under the control of, another person including the candidate committee of Richard Bandstra.

8. The June 9, 1985 newspaper advertisement will carry the following disclaimer and identification in a place and print clearly visible and readable by an observer:

> Not Authorized by the Candidate Committee of Richard Bandstra. Paid for by the Michigan State Chamber of Commerce, Suite 400, 200 N. Washington Square, Lansing, MI 48933.

9. I have attached hereto a printers proof of the adver-

tisement which the State Chamber has prepared advocating the election of Richard Bandstra as State Representative which advertisement will be submitted to the *Grand Rapids Press* for publication if the State Chamber will not be subject to criminal felony prosecution under Section 54.

10. Section 54 puts the State Chamber to the impossible choice of (1) exercising its constitutional rights by running the advertisement and risking threatened felony prosecution, with the attendant criminal fines and penalties; *or* (2) obeying the restrictions contained in Section 54 and suppressing its constitutional rights thereby foregoing any opportunity to engage in the public discussion on important issues and debate involved in the Special Election.

11. As President and Chief Executive Officer of the State Chamber, I am authorized to employ Dykema, Gossett, Spencer, Goodnow & Trigg to represent the Michigan State Chamber of Commerce and its officers and directors in bringing any appropriate lawsuit on behalf of the State Chamber in a court of competent jurisdiction seeking a determination of the validity of Section 54 of the Michigan Campaign Finance Law (MCLA 169.254) as to the purchase of the advertisement.

FURTHER, AFFIANT SAYETH NOT.

/s/ E. James Barrett
E. James Barrett

Subscribed and sworn to before me, a Notary Public, in and for said County and State on the 23 day of May, 1985.

/s/ Debra K. Merrill
Debra K. Merrill, Notary Public Ingham County, Michigan
My Commission Expires: 9/15/87

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th, Elect Richard Bandstra State Representative 93rd House District Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

Not authorized by the Candidate Committee of Richard Bandstra
Paid for by the Michigan State Chamber of Commerce • Suite 400 200 N. Washington Square • Lansing, Michigan 48933

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, Plaintiff, v RICHARD H. AUSTIN, Secretary of State, and FRANK J. KELLEY, Attorney General, Defendants.	No. G85-496 CA Honorable Douglas W. Hillman

ANSWER

NOW COME DEFENDANTS by their attorneys, Frank J. Kelley, Attorney General and Gary P. Gordon and Richard P. Gartner, Assistant Attorneys General, and in answer to Plaintiff's Complaint state as follows:

1. Defendants admit generally that the Michigan State Chamber of Commerce is a nonprofit Michigan corporation having its principle office in the City of Lansing, Michigan. As to the specific allegations relating to the purposes of the Chamber of Commerce and the number of entities represented by the Chamber of Commerce, Defendants lack sufficient information to form a belief as to the truth thereof and, accordingly, neither admit nor deny the same.

2-3. Defendants admit the allegations contained in paragraphs 2 and 3.

4. The allegations contained in paragraph 4 constitute conclusions of law to which no answer is required and, accordingly, Defendants neither admit nor deny the same.

5. Defendants admit that 1976 PA 388; MCLA 169.201 *et seq*; MSA 4.1703(1) *et seq*, (hereinafter "the Act"), was enacted on or about December 30, 1976 and generally relates to those areas of concern listed in paragraph 5. Further answering, Defendants assert that 1976 PA 388 speaks for itself and should be referred to in its entirety to ascertain the purposes and areas of regulation encompassed in the Act.

6. Defendants neither admit nor deny the legal conclusions set forth in paragraph 6 summarizing §54 of 1976 PA 388 and further answer that the Act speaks for itself and should be referred to in its entirety for its meaning. Further answering, Defendants admit the penalty referred to in paragraph 6 is correct.

7. Defendants admit that a portion of §6(1) of the Act is quoted correctly in paragraph 7. Further answering, Defendants assert that the Act speaks for itself and must be read in its entirety.

8. Defendants admit that a portion of §9(1) of the Act is correctly quoted in paragraph 8 but further answer that the Act speaks for itself and must be referred to in its entirety for purposes of ascertaining its meaning and definitions.

9. Defendants deny the allegations contained in paragraph 9 because they are untrue. Further answering, Defendants assert that corporations are allowed to establish separate segregated funds for the purpose of participating in public discussion and debate on important issues and that, accordingly, corporations are allowed great participation in public debate and discussion concerning the nomination or

election of candidates. Further answering, to the extent there are remaining conclusions of law in this paragraph, Defendants are not required to answer and, accordingly, leave Plaintiff to its proofs. Further answering, corporate officers, directors, stockholders, attorneys or agents of the corporation are allowed to fully participate as individuals in the electoral process. Additionally, the Act allows a corporation to communicate utilizing corporate funds with its shareholders and members regarding political positions of the corporation. Finally, corporations are not precluded from participating in the political process with regard to important issues in that corporations are allowed to make unlimited independent expenditures in support or opposition to ballot proposals and may contribute up to $40,000 to ballot question committees.

10. Defendants neither admit nor deny the legal conclusions summarizing 1976 PA 388 contained in paragraph 10 and assert that the Act speaks for itself. Further answering, Defendants assert that the Act contains various limitations on the amount and form of expenditures that may be made by various entities.

11. Defendants deny the legal conclusions and factual allegations contained in paragraph 11 for the reason they are untrue. Further answering, Defendants assert that to the extent that paragraph 11 attempts to summarize the effect of the Act, the Act must be read in its entirety and speaks for itself. Further answering, corporate officers, directors, stockholders, attorneys or agents of the corporation are allowed to fully participate as individuals in the electoral process. Additionally, the Act allows a corporation to communicate utilizing corporate funds with its shareholders and members regarding political positions of the corporation. Finally, corporations are not precluded from participating in the political process with regard to important issues in that corporations are allowed to make unlimited independent expenditures in support or opposition to ballot proposals and may contribute up to $40,000 to ballot question committees.

12. Defendants admit the allegations contained in paragraph 12.

13. Defendants deny the legal conclusions and factual allegations contained in paragraph 13 for the reason they are untrue. Further answering, Defendants assert that Plaintiff is allowed to participate in any special election through the use of separate segregated funds which are allowed to be established through the use of corporate funds. Further answering, corporate officers, directors, stockholders, attorneys or agents of the corporation are allowed to fully participate as individuals in the electoral process. Additionally, the Act allows a corporation to communicate utilizing corporate funds with its shareholders and members regarding political positions of the corporation. Finally, corporations are not precluded from participating in the political process with regard to important issues in that corporations are allowed to make unlimited independent expenditures in support or opposition to ballot proposals and may contribute up to $40,000 to ballot question committees.

14. Defendants are without sufficient information to form a belief as to the truth of the allegations of paragraph 14 and neither admit nor deny the same and leave Plaintiff to its proof.

15. Defendants deny any allegations asserting that Plaintiff will not be allowed to participate in the special election referred to in the preceding paragraphs. To the extent that paragraph 15 constitutes conclusions of law, Defendants are not required to answer same and, accordingly, leave Plaintiff to its proofs. Further answer, as to the remaining factual alle-

gations in paragraph 15, Defendants lack sufficient information upon which to form a belief as to the truth of the same and, accordingly, leave Plaintiff to its proofs.

16. Paragraph 16 constitutes legal conclusions to which no answer is required and, accordingly, Defendants neither admit nor deny same and leave Plaintiff to its proofs.

17. The allegations of paragraph 17 constitute conclusions of law to which no answer is required and, accordingly, none is presented. To the extent that paragraph 17 constitutes allegations of fact, Defendants deny the same because they are untrue.

18. Paragraph 18 constitutes conclusions of law to which no answer is required regarding the impact of § 54 of the Act. To the extent that paragraph 18 constitutes allegations of fact, Defendants deny the same as being untrue.

19. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 19 and, accordingly, neither admit nor deny the same and leave Plaintiff to its proofs. Further answering, to the extent that paragraph 19 is an assertion that Plaintiff has been denied timely, effective and fair participation in elections in the State of Michigan, the same is denied as being untrue.

20. Defendants deny the legal conclusions and factual allegations contained in paragraph 20 for the reason they are untrue.

21. To the extent that paragraph 21 constitutes conclusions of law, no answer is required and, accordingly, none is presented. Further answering, Defendants deny that no harm will be suffered through the issuance of an injunction restraining enforcement of the Act. Defendants assert that

the Act is a valid and legal policy statement of the people of the State of Michigan enacted by its Legislature and that by restraining enforcement of the Act, *prima facie* harm is incurred by the people of the State of Michigan through the voiding of a validly enacted and constitutional regulation preventing undue corporate influence in the electoral process. Further answering, Defendants assert that should enforcement of the Act be enjoined, the purity of Michigan elections will be threatened and/or impaired allowing undue influence or the appearance thereof by corporations to take place contrary to the policy adopted by the people of the State of Michigan through enactment of the Campaign Finance Act.

22. Defendants reallege and incorporate by reference each and every answer contained in paragraph 1 through 21.

23. Paragraph 23 constitutes conclusions of law to which no answer is required. However, Defendants deny the conclusions of law as being incorrect and untrue.

24. Defendants deny the allegations of paragraph 24 for the reason they are untrue.

25. To the extent that the allegations of paragraph 25 constitute legal conclusions, no answer is required, however, Defendants deny the conclusions as untrue. Further answering, to the extent that paragraph 25 constitutes factual allegations, Defendants deny the same as being untrue.

26. Defendants lack sufficient information to form a belief as to the truth of the allegations of paragraph 26 and accordingly, neither admit nor deny the same and leave Plaintiff to its proofs.

27. Defendants admit the allegations contained in paragraph 27.

28. Defendants deny the legal conclusions contained in paragraph 28 for the reason they are untrue. Further answering, Defendants assert that there are no constitutional rights of Plaintiff being violated by the provisions of § 54, rather § 54 acts to preserve the purity and to prevent the appearance of corruption of the Michigan electoral process.

29. Defendants lack sufficient information to form a belief as to whether Plaintiff and its members are "fearful" and, accordingly, leave Plaintiff to its proofs as to that allegation. Further answering, Defendants deny the remaining legal conclusions and factual allegations contained in paragraph 29 for the reason they are untrue.

30. Defendants reallege and incorporate by reference every answer contained in paragraphs 1 through 29.

31. Paragraph 31 constitutes legal conclusions to which no answer is required and, accordingly, Defendants do not answer the same. Further answering, Defendants assert that the Campaign Finance Act speaks for itself and does, indeed, provide certain limitations on campaign contributions, expenditure and other participation by individuals, partnerships, labor organizations, unincoporated associations and other legal entitities or persons.

32. Paragraph 32 constitutes legal conclusions to which no answer is required, however, Defendants deny the same for the reason they are untrue.

33. Paragraph 33 constitutes legal conclusions to which no answer is required, however, Defendants deny the same for the reason they are untrue.

34. To the extent that paragraph 34 constitutes legal conclusions, no answer is required and, accordingly, none is provided. Further answering, Defendants deny the factual allegations contained in paragraph 34 for the reason they are untrue.

35. Paragraph 35 constitutes legal conclusions to which no answer is required, however, Defendants deny the same for the reason they are untrue.

36. Defendants lack sufficient information to form a belief as to whether Plaintiff and its members are "fearful" and, accordingly, leave Plaintiff to its proofs as to that allegation. Further answering, Defendants deny the remaining legal conclusions and factual allegations contained in paragraph 29 for the reason they are untrue.

AFFIRMATIVE DEFENSES

The Defendants rely upon the following affirmative defenses in response to Plaintiff's Complaint, however, Defendants reserve the right to assert other affirmative defenses as their applicability becomes apparent through the course of discovery and other proceedings in this matter:

1. Plaintiff's Complaint should be barred by the doctrine of laches in that the Act complained of herein was enacted in 1976 and in one form or another the State of Michigan has prevented independent corporate participation on behalf of or in opposition to candidates since approximately 1913.

2. This Court should abstain from hearing of this case due to the fact that the Michigan Supreme Court in *Advisory Opinion 1975 PA 227*, 396 Mich 465, 490; 242 NW2d 3 (1976) has specifically addressed the constitutionality of pro-

hibiting corporate contributions or expenditures for the purpose of nominating or election of a candidate under a challenge raising questions of equal protection and freedom of speech. The Court, in issuing the nonbinding advisory opinion, had benefit of the position of the Michigan State Chamber of Commerce, Plaintiff herein, as amicus. Accordingly, the Michigan Courts have addressed this issue generally regarding the interpretation of Michigan law as applied to Michigan elections thereby suggesting that this Court should exercise the doctrine of judicial abstention in favor of an action to be brought in the Michigan Courts.

WHEREFORE, Defendants respectfully request this Court to deny all relief to Plaintiff, to uphold the validity and constitutionality of the Michigan Campaign Finance Act and to further order such attorney fees and costs and other expenses to Defendants as the Court may adjudicate proper. Alternatively, Defendants respectfully request this Court to dismiss the case or hold it in abeyance pursuant to the doctrine of abstention and require the Chamber of Commerce to bring said action in the Michigan Courts requesting an interpretation of Michigan law as applied to Michigan elections.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Gary P. Gordon
Richard P. Gartner
Assistant Attorneys General

Attorneys for Defendants

Business Address:
650 Law Building
525 West Ottawa Street
Lansing, MI 48913
(517) 373-6434

Dated: June 24, 1985

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, Plaintiff, v RICHARD H. AUSTIN, Secretary of State, and FRANK J. KELLEY, Attorney General, Defendants.	Case No. G 85-496-CA HON. DOUGLAS W. HILLMAN

MOTION FOR LEAVE
TO AMEND PLAINTIFF'S VERIFIED
COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

NOW COMES the Plaintiff by and through its counsel, Dykema, Gossett, Spencer, Goodnow & Trigg, and moves the Court for leave to amend its Verified Complaint for Declaratory and Injunctive Relief, dated May 24, 1985, as follows:

1. Amend paragraph 31 to add: "or to media-related corporations for any news story, commentary or editorial."

2. Amend paragraph 34 by inserting ", media-related corporations" after "labor organizations."

A proposed Order is attached hereto for the convenience of the parties and the Court.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
Attorneys for Plaintiff,
Michigan State
Chamber of Commerce
By: /s/ Joel M. Boyden
Joel M. Boyden (P11073)
Richard D. McLellan (P17503)
William J. Perrone (P27591)
800 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 374-9100

Date: May 9, 1986

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, Plaintiff, v RICHARD H. AUSTIN, Secretary of State, and FRANK J. KELLEY, Attorney General, Defendants.	Case No. G 85-496-CA HON. DOUGLAS W. HILLMAN

ORDER AMENDING
PLAINTIFF'S VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

At a session of said Court on the 13th day of June, 1986, held in the City of Grand Rapids, Michigan.

This matter having come on to be heard upon Plaintiff's Verified Complaint for Declaratory and Injunctive Relief, arguments of counsel having been heard and the Court having been fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff's Verified Complaint for Declaratory and Injunctive Relief, dated May 24, 1985, be and the same is hereby amended as follows:

1. Paragraph 31 is amended to add: "or to media-related corporations for any news story, commentary or editorial."

2. Paragraph 34 is amended to insert ", media-related corporations" after "labor organizations."

/s/ Douglas W. Hillman
DOUGLAS W. HILLMAN
DISTRICT JUDGE

Countersigned:

Court Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, Plaintiff, v RICHARD H. AUSTIN, Secretary of State, and FRANK J. KELLEY, Attorney General, Defendants.	Case No. G 85-496-CA HONORABLE DOUGLAS W. HILLMAN

DEFENDANTS' ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

NOW COME Defendants Richard H. Austin, Secretary of State of the State of Michigan, and Frank J. Kelley, Attorney General of the State of Michigan, by and through their attorneys, Frank J. Kelley, Attorney General, and Gary P. Gordon and Richard P. Gartner, Assistant Attorneys General, and make their answer to Plaintiff's Amended Complaint, respectfully representing to this Court as follows:

31. In answer to paragraph 31 of the Amended Complaint, Defendants assert that the allegations contained therein are conclusions of law requiring no answer.

34. In answer to paragraph 34 of the Amended Complaint, Defendants deny the allegations contained therein for the reason that such allegations are not true.

RELIEF

WHEREFORE, Defendants respectfully request this Honorable Court to dismiss Plaintiff's Amended Complaint with prejudice.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Gary P. Gordon

Richard P. Gartner
Assistant Attorneys General

Attorneys for Defendants

Business Address:
600 Law Building
525 West Ottawa Street
Lansing, MI 48913
(517) 373-6434

Dated: June 25, 1986

UNITED STATES OF AMERICA
DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation, Plaintiff, v. RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General, Defendants.	Case No. G 85-496-CA5 NOTICE OF APPEAL

Notice is hereby given that the Michigan State Chamber of Commerce, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order entering judgment in favor of Defendants and against the Plaintiff entered in this action on September 3, 1986.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
Attorneys for Plaintiff
Michigan State Chamber
of Commerce

By: /s/ Joel M. Boyden
Joel M. Boyden (P11073)
Richard D. McLellan (P17503)
William J. Perrone (P27591)
800 Michigan National Tower
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(517) 374-9174

Date: 9/16/86, 1986

INDEX TO TRIAL EXHIBITS
PLAINTIFF'S EXHIBITS

Exhibit Designation	*Description*	*Appendix Page Reference*
Plaintiff's Ex 1	Resume of H. Richard Mayberry, Jr.	
Plaintiff's Ex 3	1985-1986 Michigan Directory, prepared by Michigan State Chamber of Commerce	40a
Plaintiff's Ex 4	An Information & Referral Directory, United Way of Michigan Member Services	
Plaintiff's Ex 5	H. Richard Mayberry, Jr.'s Tables Ia, Ib, II, IIa and IIb	
Plaintiff's Ex 6	Compilation of Federal Election Commission Reports	
Plaintiff's Ex 7	*Managing Corporate Political Action Committees*, The Conference Board, Report No. 880	
Plaintiff's Ex 9	By-Laws of the Michigan State Chamber of Commerce, Revised April 24, 1980	43a
Plaintiff's Ex 10	Michigan State Chamber of Commerce, Board of Directors, 1985-1986	
Plaintiff's Ex 11	1976 Journal of the Senate, September 29, 1976	
Plaintiff's Ex 12	1976 Journal of the Senate, September 30, 1976	
Plaintiff's Ex 13	*The Grand Rapids Press* editorial, June 7, 1985	57a

Exhibit Designation	*Description*	*Appendix Page Reference*
Plaintiff's Ex 14	Proposed advertisement for Richard Bandstra	60a
Plaintiff's Ex 15	AEL-CIO Stipulation and Order in *Republican National Committee* v *Federal Election Commission*, United States District Court for the Southern District of New York, No. 78 Civ. 2783 (LPG)	
Plaintiff's Ex 16	UAW Stipulation and Order in *Republican National Committee* v *Federal Election Commission*, United States District Court for the Southern District of New York, No. 78 Civ. 2783 (LPG)	

DEFENDANTS' EXHIBITS

Defendants' Ex 1	Edwin M. Epstein Bibliography
Defendants' Ex 2	Edwin M. Epstein Vita
Defendants' Ex 3	Edwin M. Epstein Tables 1-9
Defendants' Ex 4a	Michigan Department of State, Campaign Expenditures Report, CF/0030
Defendants' Ex 4b	Michigan Department of State, Campaign Expenditures Report, CF/0040

Exhibit Designation	*Description*	*Appendix Page Reference*
Defendants' Ex 5	Memorandum from Senator John M. Engler to Senate Rules Committee Members, dated August 27, 1985 regarding PAC Contributions in the 1983-1984 Election Cycle.....	
Defendants' Ex 6	1984 Statistical Report for Candidate, Independent, Political and Ballot Question Committees, prepared by Michigan Department of State	
Defendants' Ex 7a	Bill Analysis of House Bill 5250, Dated June 25, 1975 ...	
Defendants' Ex 7b	Bill Analysis of House Bill 5250, dated July 22, 1975	
Defendants' Ex 7c	Bill Analysis of House Bill 5250, dated August 7, 1975...	
Defendants' Ex 7d	Bill Analysis of Senate Bill 1570, dated December 17, 1976	
Defendants' Ex 8	1984 Michigan PAC Directory, prepared by Michigan State Chamber of Commerce	
Defendants' Ex 9	Director of Business and Professional State Level Political Action Committees in Michigan, April 1, 1979, prepared by Michigan State Chamber of Commerce	
Defendants' Ex 10	Independent and Political Committee Special Election	

Exhibit Designation	*Description*	*Appendix Page Reference*
	Data 1979-1984, prepared by Michigan Department of State.	
Defendants' Ex 11	*Tuscola County Advisor* Advertisement, November 10, 1985 .	
Defendants' Ex 12	*Bay City Times* Advertisement, November 6, 1983	
Defendants' Ex 13	B*ay City Times* Advertisement, August 5, 1984	
Defendants' Exs 14-36	Certified copies of Articles of Incorporation of 22 incorporated labor unions in Michigan	
Defendants' Ex 37a	Article from *Campaigns and Elections*, written by H. Richard Mayberry, Jr., Summer, 1980	
Defendants' Ex 37b	Article from *Campaigns and Elections*, written by H. Richard Mayberry, Jr., Fall, 1980	
Defendants' Ex 37c	Article from *Campaigns and Elections*, written by H. Richard Mayberry, Jr., Spring, 1981	
Defendants' Ex 37d	Article from *Campaigns and Elections*, written by H. Richard Mayberry, Jr., Winter, 1981	
Defendants' Ex 37e	Article from *Campaigns and Elections*, written by H. Richard Mayberry Jr., Summer, 1981	

PLAINTIFFS EXHIBIT 3

PLAINTIFFS EXHIBIT 3

About This Directory . . .

The State Chamber is pleased to present its 1985 - 86 Michigan Directory. This one-of-a-kind publication is valued throughout Michigan, and beyond, as a handy and practical resource guide to local chambers of commerce and trade and professional associations.

Michigan Directory is intended to provide ready access to names, phone numbers and office locations that can be of assistance to you on a wide variety of issues.

This edition also includes convention and visitors bureaus, and selected state departments. As an added service, we are offering address labels of the listed local chambers and associations (see the back page for ordering and cost details).

Michigan Directory serves as the State Chamber's invitation for business, local chambers, trade and professional associations and state departments to engage in open dialogue, united action and consistent cooperation to achieve these common goals: more jobs for the people of Michigan, greater opportunities for business and continued improvement of Michigan's economy.

We appreciate the assistance of all those who provided us with current information. If you have any corrections or additions to this directory, or ideas for future editions, please contact Phil Guyeskey, Manager of Small Business Programs, at the State Chamber.

Jim Barrett

Jim Barrett, President
Michigan State Chamber of Commerce

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MICHIGAN STATE CHAMBER OF COMMERCE

200 N. Washington Sq.
Suite 400
Lansing, MI 48933

Price: $3.50 - State Chamber Members
$7.00 - Non-members

PLAINTIFFS EXHIBIT 3

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State Chamber Staff . . . . . Inside Back Cover

The State Chamber is . . .

. . . a non-profit organization of more than 8,000 businesses, local chambers of commerce, and trade and professional associations. Formed in 1959 to represent a broad cross-section of business interests, the State Chamber's membership is made up of about 80% small business firms which employ less than 100 persons.

The State Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The State Chamber seeks to promote conditions favorable to the economic development and expansion of job opportunities in Michigan. Its purpose, also, is to analyze existing and proposed laws, rules and regulations and advise State Chamber members and the general public of their impact on Michigan's economic climate.

As Michigan's leading business advocate, the State Chamber actively speaks out on legislative, political, legal, economic and social issues that affect the business community.

The State Chamber also provides a wide variety of membership services—including regular and special publications, legislative briefings, group insurance, a business hot-line, and seminars—designed to help members operate effectively, profitably and responsibly.

PLAINTIFF'S EXHIBIT 9

BY-LAWS OF THE MICHIGAN STATE CHAMBER OF COMMERCE

Revised April 24, 1980

1. *Name and Location.* The name of this association shall be the Michigan State Chamber of Commerce, a non-profit corporation, incorporated in the State of Michigan. The offices of the association shall be located at Lansing, Michigan.

2. *Objectives and Purposes.* The objectives and purposes of the association as stated in the Articles of Incorporation shall be:

   A. In general, to endeavor to promote conditions favorable to the economic development of the State of Michigan and the preservation of and enhancement of the American System of private enterprise.

   B. To analyze, compile and disseminate information on laws and regulations of interest to the members, and to determine and make known to government the views of the business community relative to any such matters.

   C. To further the training and education of the membership by means of educational materials, seminars, conventions, bulletins, newsletters, reports and technical materials.

   D. To function in the public interest by encouraging the maintenance and observance of ethical business practices and standards of conduct.

E. To collect data and make investigations and surveys relative to matters of social, civic, and economic importance to the State of Michigan.

F. To receive expenditures and make contributions for political purposes: to establish, administer and solicit contributions to a political action committee; to perform any other acts of a political nature permitted by the laws of the State of Michigan.

G. To cooperate with other organizations formed for similar purposes.

H. To engage in any activity within the purposes for which Michigan non-profit corporations may be organized under Act 327 of the Public Acts of 1931, as amended, which is consistent with exemption from Federal Income Tax under Paragraph 501(c)(6) of the Internal Revenue Code.

3. *Membership.* The membership of the Michigan State Chamber of Commerce shall be divided into four classifications.

A. *Individual.* Any individual is eligible for individual membership.

B. *Firm.* Any person, corporation or partnership doing business in Michigan is eligible for a firm membership.

C. *Organization.* Any group or association formed for the purpose of carrying on lawful activity for the economic or social welfare of the State of Michigan or for the economic or social welfare of businesses or professions located within the State of Michigan is eligible to become organization members.

D. *Associate or Honorary.* The Board of Directors may provide for associate or honorary members and may prescribe the qualifications and membership rights for such associate or honorary members. Associate or honorary members shall not vote or be eligible to serve as a Director or officer.

4. *Application for Membership.* All applicants for membership subscribing to the objectives of the Michigan State Chamber of Commerce shall complete and sign the form of application provided and shall submit the application to the President of the Chamber. Admission of all applicants for membership shall be by vote of the Board of Directors, or in such other manner as the Board of Directors may determine.

Removal. Members of any classification may be removed from membership by the President for cause by a two-thirds vote of the members of the Executive Committee. For any cause other than non-payment of dues, removal shall occur only after the member complained against has been advised of the complaint lodged against the member and has been given reasonable opportunity for defense including the opportunity to appear in person and to be represented by counsel. Sufficient cause for suspension or removal shall be violation of the By-laws or any lawful rule or practice duly adopted by the State Chamber, or any other conduct prejudicial to the interest of the State Chamber.

5. *Dues.* The dues shall be at the discretion of the Board of Directors who will periodically set a schedule of such dues. Annual dues shall be payable in advance. Failure to pay dues within 30 days after notice that such dues are payable shall cause the member to be delinquent and he or she shall be sent a second notice. After such second notice the member shall

not be in good standing until all dues in arrears are paid. A failure to pay dues within three months after they shall become due shall be grounds for suspension or expulsion at the discretion of the Board of Directors.

6. *Fiscal Year.* The fiscal year of the Michigan State Chamber of Commerce shall be from July 1 to June 30.

7. *Representation.* Each individual and firm member shall have one vote on any matter voted on by the members; provided, however, that the Board of Directors may by notification suspend voting privileges of a member or members who are officers of or employees of a corporation, partnership or organization which is eligible for membership in the Chamber but which has not joined the Chamber for reasons that in the opinion of the Board such firm is using individual membership of its employees to avoid firm or organization membership in the Chamber.

Each member whose dues shall exceed $100.00 per year shall have one vote for each $100.00 of its annual dues not to exceed ten votes in number. An organization member shall have one vote for its first 100 members or less and one additional vote for an additional 200 members or fractions thereof but in no event shall any organization member have more than five votes for its organization. In reference herein, members shall mean membership in such organization and not membership in the Michigan State Chamber of Commerce. An Executive Officer of a corporation or partnership or organization or any member or any other employee of such corporation, partnership or organization as may be designated by the managing

body or Executive Officer of such corporation, partnership or organization may vote and act for such corporation upon notice being given to the Chief Executive Officer of the Michigan State Chamber of Commerce that such officer or employee is the authorized representative of such corporation, partnership or organization in the Michigan State Chamber of Commerce.

BOARD OF DIRECTORS

8. *Districts.* To insure the representation on the Board of Directors from all sections of the State as well as for administrative and other purposes of the Michigan State Chamber of Commerce, the State shall be divided into the following eight districts:

DISTRICT NO. 1 (Upper Peninsula) would include the counties of Keweenaw, Gogebic, Ontonagon, Houghton, Baraga, Iron, Marquette, Dickinson, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac and Chippewa.

DISTRICT NO. 2 (Northern) would include the counties of Emmet, Lake, Cheboygan, Presque Isle, Leelanau, Antrim, Otsego, Montmorency, Alpena, Benzie, Grand Traverse, Kalkaska, Crawford, Oscoda, Alcona, Manistee, Wexford, Missaukee, Roscommon, Ogemaw, Iosco, Mason, Osceola, Clare, Gladwin, Arenac and Charlevoix.

DISTRICT NO. 3 (West Central) would include the counties of Oceana, Newaygo, Mecosta, Isabella, Muskegon, Ottawa, Kent, Montcalm and Ionia.

DISTRICT NO. 4 (East Central) would include the counties of Midland, Bay, Huron, Gratiot, Saginaw, Tuscola, Sanilac, Genesee, Lapeer and St. Clair.

DISTRICT NO. 5 (Southwestern) would include the counties of Berrien, Cass, St. Joseph, Kalamazoo, Barry, Allegan, Calhoun and Van Buren.

DISTRICT NO. 6 (South Central) would include the counties of Eaton, Ingham, Clinton, Jackson, Branch, Hillsdale, Lenawee and Shiawassee.

DISTRICT NO. 7 (Southeastern) would include the counties of Macomb, Oakland and Livingston.

DISTRICT NO. 8 (Lower Southeastern) would include the counties of Wayne, Monroe and Washtenaw.

9. *Composition of Board.* The Board of Directors shall consist of the following number and classes of Directors whose manner of election and qualification shall be as follows:

A. *District Directors.* Six Directors shall be elected from each of Districts Number 1, 2, 3, 4, 5, and 6, and fifteen Directors shall be elected from both Districts Number 7 and 8. A District Director shall be a resident or employed in the district from which he or she is elected.

B. *Directors-At-Large.* At least 12 and as many as 18 Directors-at-Large shall, as determined by the Board of Directors, be elected at-large without regard to place of residence or place of employment.

C. *Local Chamber Director.* One director shall be a local Chamber of Commerce executive serving as an at-large member for a one year term. The Board of Directors of the Michigan Chamber of

Commerce Executives shall recommend to the Board of Directors a candidate for Chamber Executive Director.

D. *Officer Directors.* The members of the Executive Committee shall be the officer directors.

E. *Term.* Each District Director and each Director-at-Large shall hold office for a term of two years, or until a successor has been elected and qualified. After serving three consecutive terms as director, an interval of two years shall elapse before a District Director or a Director-at-Large may be re-elected as a District Director or as a Director-at-Large.

F. *Qualifications.* No person may serve as a Director unless he or she shall hold an individual membership or is a representative, an officer or partner of a firm or organization holding membership.

G. *Transition Provision.* Notwithstanding the provisions of Paragraphs A and B of this Section 9, the following numbers of District Directors and Directors-at-Large shall be elected from Districts 7 and 8 and at-large during a transition period ending June 30, 1983:

(i) Fiscal Year 1980-81: District 7, not more than 14 Directors; District 8, not more than 21 Directors; At-Large, not more than 12 Directors.

(ii) Fiscal Year 1981-82: District 7, not more than 14 Directors; District 8, not more than 18 Directors; At-Large, not more than 15 Directors.

(iii) Fiscal Year 1982-83: District 7, 15 Direc-

tors; District 8, 15 Directors; At-Large, not more than 18 Directors.

10. *Nomination.* At the first Board meeting of the calendar year, the Chairperson of the Board and the President shall appoint a nominating committee for Directors with the approval of the Board of Directors. Such Committee shall contain one member from each district. Such committee shall select one nominee for each Director to be elected. The nominations shall be completed before May 1, to provide sufficient time for preparation of the ballot and completion of details of the election.

11. *Election.* The Directors shall be elected by mail ballot. A special Elections Committee shall be appointed by the President with the approval of the Board of Directors. A ballot shall be prepared containing the names of the candidates arranged in numerical order, by district for District Directors, and in alphabetical order for Directors-at-Large. Terms of office, date and hour of closing of election, and other pertinent data shall be on the ballot. The ballots shall be mailed to each eligible voting member, in good standing, of the Michigan State Chamber of Commerce. Provisions shall be made on the ballot for any member to write in a name for any vacancy in his district. No less than ten days shall elapse between the mailing of the ballots and the closing of the election. The election shall be completed and closed no later than thirty days prior to the end of the fiscal year.

12. *Meetings.* The Board of Directors shall meet not less than four times a year. Meetings of the Board may be held at any time on call by the Board Chairperson, the President, or by written request made by seven Directors and submitted to the President and Chairperson of the Board.

13. *Vacancies.* Should a vacancy occur on the Board of Directors because of resignation or other cause, the Board may fill the vacancy for the remainder of the term, but the Director so elected shall possess the same qualifications as required for the Director whose unexpired term is being filled; provided, however, that should a vacancy exist on the Board of Directors at the time of appointment of the Nominating Committee provided for in Section 10 of these By-laws, such vacancy shall be filled by the regular procedure for nomination and election except that the nominee elected to fill a vacancy shall serve only for the remainder of the term.

14. *Voting.* Each Director shall cast one vote on all questions coming before the Board of Directors and all questions shall be decided by a majority of the votes thus cast. Any question as to procedure at a meeting of the Board which is not provided for in the by-laws shall be determined according to *Robert's Rules of Order, Newly Revised.*

15. *Quorum.* Twenty-five members of the Board of Directors shall constitute a quorum.

16. *Written Consent.* Any action required or permitted to be taken by law, at any meeting of the Board of Directors may be taken without a meeting, without prior notice and without a vote, except as provided herein, if consent thereto is given in writing by members with not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all members entitled to vote thereon were

present and voted. Prompt notice thereof shall be given to all members not giving written consent.

EXECUTIVE COMMITTEE

17. The Executive Committee shall be composed of the Chairperson, eight Vice Chairpersons, the President and the immediate Past Chairperson. The Executive Committee may exercise the powers of the Board of Directors while the Board is not in session, except that the Executive Committee shall not have power to elect Officers of the Chamber or to amend the by-laws. Six members of the Committee shall constitute a quorum. A majority vote shall determine any proposal except that if only six members are present the affirmative vote of four members of the Committee shall be required to determine any proposal.

Any meeting of the Executive Committee may be conducted in whole or in part by conference telephone call, and consent may be given to any action by written statement, telegram, or instructions by telephone.

OFFICERS

18. *Officers Defined.* The elected officers of the Chamber shall be a Chairperson of the Board, eight Vice Chairpersons, one from each district, and a Treasurer. The Board of Directors may appoint the Chief Executive Officer who shall be a Director of the Chamber and shall have the title of President. The President may appoint a Corporate Secretary who may be a paid staff member. The Board of Directors may create such other offices as it may deem advisable.

19. *Nominations.* Nominations for Chairperson of the Board, for eight Vice Chairpersons and for Treasurer shall be made by a Nominating Committee for officers appointed by the Chairperson of the Board and President with the approval of the Board of Directors. Any Director may nominate any eligible person for any such offices at the Board meeting at which the election occurs. Those nominated may be selected from the Board of Directors or from persons eligible for election as Directors.

20. *Election.* The Chairperson of the Board, the eight Vice Chairpersons and the Treasurer shall be elected by the Board of Directors at the first meeting after closing of election of Directors. The Chief Executive Officer shall be appointed by the Board of Directors under such duties, tenure and compensation as may be decided by the Board.

21. *Compensation.* Elected officers of the Chamber, other than the President, shall serve without compensation.

22. *Term of Office.* The term of the Chairperson of the Board, the eight Vice Chairpersons, and the Treasurer shall be for one year, or until a successor is qualified. The Chairperson of the Board shall not succeed himself/herself in office more than once. The Treasurer may be elected to successive terms of office as determined by the Board. Vice Chairpersons may be elected to successive terms of office provided such election does not violate the term limitation imposed by by-law #9 (e).

23. *Vacancies.* In the event of the temporary absence or temporary disability to perform the duties of his office on the part of the Chairperson of the Board, a Vice Chairperson or the Treasurer, the Board of Directors

shall designate someone to perform the duties of such office during the period of such absence or disability. In the event of the death, resignation or permanent disability of the Chairperson of the Board, a Vice Chairperson or the Treasurer, the Board of Directors shall elect a Chairperson of the Board, a Vice Chairperson or Treasurer for the remainder of the unexpired term.

In the event of the temporary absence or the temporary disability to perform the duties of his or her office on the part of the President, the Board of Directors or Executive Committee shall designate some person or persons to perform the duties of President during the period of such absence or disability. In the event of the death, resignation or permanent disability of the President, the Board of Directors or Executive Committee may designate an acting President until such time as a new President is appointed by the Board of Directors pursuant to Section 20.

DUTIES OF OFFICERS

24. *Chairperson of the Board.* The Chairperson of the Board shall be the chief elected officer of the Chamber, shall be the Chairperson of the Executive Committee, shall preside at all meetings of the members and the Board of Directors and with the approval of the Board of Directors, or Executive Committee, shall appoint and discharge committees and require reports in writing, when necessary, to the Board of Directors.

25. *Vice Chairpersons.* The Vice Chairpersons of the Chamber shall be members of the Board of Directors and the Executive Committee. They shall represent their respective districts on the Board of Directors and

in the event of the absence or disability of the Chairperson of the Board one of their number will be chosen by the Board of Directors to act in the place of the Chairperson of the Board. In event of the temporary absence of the Chairperson of the Board, a Vice Chairperson will be chosen at the meeting of the Board of Directors, Executive Committee or any other meeting, to act as Chairperson of the meeting.

26. *Treasurer.* The Treasurer shall perform the duties usually pertaining to his office and shall be a Director.

27. *Chief Executive Officer.* Subject to the general policies of the Board, the President shall be the Chief Executive Officer of the Chamber, perform all executive duties, including the employment and supervision of the salaried staff of the Chamber, attend or be represented at meetings of the Chamber and of the Board and shall, as far as possible, attend and be represented at meetings of the committees of the Chamber, supervise all publications of the Chamber, cause a proper system of accounts to be kept of all monies received or disbursed by the Chamber, make an accounting thereof to the Board at each meeting, and perform such other duties as shall be assigned to him by the Board or the Executive Committee. The President shall give such bond as may be required by the Board of Directors.

POLICY

28. All questions of general policy shall be submitted to the Board of Directors or Executive Committee for consideration. The Board of Directors or Executive Committee may decide the policy or it may order the question or questions submitted to the membership at large for a referendum vote, together with a statement of the

arguments both for and against the proposition and a statement of the recommendations of the committee regarding it. It shall be mandatory upon the Board of Directors or Executive Committee to submit a question or questions to the membership at large for a referendum vote upon an application or petition signed by 10% of the members in good standing of the Michigan State Chamber of Commerce. A referendum vote will be taken by mail and fifteen banking days shall be allowed from the time the ballots are mailed to the membership for the return of said ballots and the closing of the referendum vote. When the said question or questions are submitted to referendum vote, it shall require the approval of a majority of the total votes cast. If the total number of ballots cast is less than 33-1/3 percent of the total membership in good standing, then the Board of Directors or Executive Committee shall call such matter to be resubmitted with appropriate notice of the necessity for a more representative vote. The proposal so submitted or resubmitted shall be settled by the majority vote in such referendum. Established policies may always be reviewed by the referendum procedure set forth herein.

AMENDMENT

29. These by-laws may be amended by the Board of Directors at any regular or special meeting, provided that any proposal for amendment shall be mailed to each Director at least ten days before the date of the meeting. These by-laws may also be amended by referendum as set forth in paragraph 28 hereof.

30. *Senior Advisory Council.* There shall be a Senior Advisory Council composed of no more than five past Chairpersons of the Board who have most recently served as chief elective officers and have completed their terms on the Board as Immediate Past Chairpersons. The function of the Senior Advisory Council shall be to form a cabinet of advisors to the Board Chairperson and President. The Senior Advisory Council shall meet upon call of the Board Chairperson or President. The members of the Council shall be members of the Board of Directors exofficio, without voting rights.

PLAINTIFF'S EXHIBIT 13

The Grand Rapids Press
Friday, June 7, 1985

93rd District: Bandstra

Grand Rapids voters in the 93rd state House District will have no easy choice on Monday.

Each of the candidates, Richard Bandstra and Robert Kolt, has the potential to be an able state representative. Each is bright, hard working and has a good grasp of state issues. Mr. Kolt generally favors a stronger and more centralized government role than does Mr. Bandstra, but their positions on many major questions in Lansing are similar.

There is, in addition, the community's need for a vigorous Democratic Party. One-party dominance tends to make government cloistered and stagnant; two-party debate and competition keeps new ideas flowing and provides a check on abuse. Mr. Kolt's candidacy has been refreshing in that way. He has campaigned openly and aggressively as a Dem-

ocrat, holding the party's standard boldly. In so doing, he has helped restore the party's visibility in Grand Rapids, given individual Democrats new inspiration and perhaps nudged some of them into running themselves. The area's need for more political balance should prompt the community to look seriously at the Democratic alternative.

But the two candidates must still be assessed on individual merits. And there Mr. Bandstra comes out ahead.

He is both a teacher and an attorney, having worked in each profession and having earned advanced degrees in sociology and law. That background would serve him well in the Legislature, where an understanding of social problems is all too uncommon and where an ability to negotiate and cope with technical legal questions is a day-to-day necessity.

Mr. Bandstra has contributed to the community through neighborhood, church and professional groups in ways that show diligence and a concern for the needy. A particular point in his favor is his volunteer work to set up a mediation service to help people quickly and inexpensively settle disputes outside of court. The candidate is smart and takes a studious approach to tasks. His moderate-to-progressive views fit the attitudes of the 93rd District.

Mr. Kolt, 26, is energetic, articulate and outgoing. Possibly his lack of substantive community experience before this race can be traced to the nature of his job. As a television reporter he had legitimate professional constraints on how actively he could get involved. But that fact does not offset the contrast.

Mr. Bandstra is also youthful, 35, but has achieved considerably more.

The Democratic Party in Kent County needs fresh faces; Mr. Kolt surely is a welcome one. He is the sort of person the party needs, for instance, on the Kent County Board of Commissioners. His presence there or in some other local office would serve both Grand Rapids and Mr. Kolt.

This campaign has been a quiet one, owing perhaps to the community's weariness at having gone to the polls so many times in recent months. But it could have been livelier had Mr. Bandstra not chosen to stay out of debates with his opponent. The strategy of ignoring an underdog opponent is familiar and understandable, but it is still a disservice to voters looking for a chance to compare and assess the candidates.

Mr. Bandstra is a newcomer to politics and concedes that he is learning lessons. The Press endorses him for election, but hopes he won't again flunk a test of fairness.

Plaintiff's Trial Exhibit 14

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th, Elect Richard Bandstra State Representative 93rd House District Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

PLAINTIFF'S EXHIBIT 14

Not authorized by the Candidate Committee of Richard Bandstra

Paid for by the Michigan State Chamber of Commerce • Suite 400 200 N. Washington Square • Lansing, Michigan 48933

INDEX REGARDING TRIAL WITNESSES

Name of Witness	Trial Record Reference	Appendix Page Reference
Barrett, E. J.	Vol. II, p 388	120a
Buell, W.	Vol. II, p 515	170a
Epstein, E. M.	Vol. I, p 22	61a
LaBrant, R. S.	Vol. II, p 471	147a
Olson, D. J.	Vol. II, p 457	
Mayberry, H. R.	Vol. I, p 193	94a
Smith, W. S.	Vol. I, p 162	91a

(Witness: Edward M. Epstein)
Epstein - Direct

* * *

[38] corporations, including the plaintiff and its member corporations, the opportunity to actively participate in the public discussion of important issues and debate during the election process. Have you an opinion as to the truth or falsity of that statement?

A I do.

Q What is your opinion?

A I believe that the plaintiff and other Michigan corporations have been able to be actively involved in the political process, the election process, and have indeed been very much involved in electoral politics in the State of Michigan.

Q What is the basis for your opinion?

A My basis for the opinion is various data that I have reviewed concerning the involvement of Michigan corporations in electoral politics. But, also, that also emanates from materials prepared, published and disseminated by the

Michigan State Chamber by various forms of various illustrations of the involvement by the—by chambers and other business-related groups, including ads placed by such entities, by accounts of involvements of the Michigan corporations that appear in the periodical press, which—well, these are primary sources.

Q Do you have an opinion as to whether the law restrains corporate entities in Michigan in the political process?

A The law constrains in the sense that it does not permit [39] treasury funds to be used for contributions, expenditures, or independent expenditures.

Q As a practical matter, does it have a restraint on corporations?

MR. BOYDEN: Excuse me, your Honor. I think I will object to that question as leading. I think the question essentially was answered in the response to the previous question, in any event.

THE COURT: Well, I will overrule that. He may answer.

A As a practical matter, those entities, those corporations that wish to be involved in the political process can be and are involved in the political process. Indeed, under the very terms of the statute itself, there is nothing that constrains corporations from communicating with their shareholders and with their professional and managerial employees with regard to political activity or views. There is no constraint on the corporations from their involvement in ballot measures, and they indeed have been very much involved in ballot measures, even in terms of independent expenditures. They can get out the vote, they can register, they can

do a variety of activities with regard to their constituencies. And that is direct activities via the political action committee mechanism. Those corporations that seek to can be very actively involved in electoral politics. They are involved here on focusing on [40] electoral politics, not even discussing lobbying it or other forms of political activity or communications to the public as a whole. As a practical matter, those Michigan corporations that wish to be involved in the political process can be and are involved in the political process.

Q Mr. Epstein, do you have an opinion why certain corporations don't form their political action committees in Michigan?

A Well, in terms of formation of political action committees and a very active role in electoral politics, this tends to be an activity of larger firms. It tends to be an activity of firms that are more politically sophisticated. It tends to be an activity of firms that have a very ongoing relationship to governmental entities within the State of Michigan.

So that the importance of having officials in office who are going to be congenial or sympathetic to the public policy needs and objectives of these corporations tends to be larger entities that focus their energies in political activity as an instrumental means of facilitating their business situations.

For smaller companies, particularly for, let's say, small closely held corporations, there is really very little advantage to the establishment of a political action committee because the principals can be involved in a political process in their individual capacities. Also smaller entities very

* * *

[50] Epstein is referring to proposed Exhibit 5.

A Actually I have it, or actually maybe, counsel, it would

be helpful if I had your copy. I seem to have sort of a summary of that. Not the working sheets. These are the actual printouts.

In terms of contributions, okay, the Michigar—I am referring now to my summary table, T-2 —

Q For the record, we are referring to Defendant's proposed Exhibit 3. Please continue.

A Which is captioned "Michigan 1984 PAC Contributions as a Percentage of all Receipts by State House Candidates," candidates for the State House; that we find in terms of the amounts of money emanating from identifiable business sources, including such industries as auto/transportation, banking and finance, chambers of commerce, construction, real estate, general business, utilities, agra business firms, that they contributed so... 1.7 million dollars or some 52 percent of all PAC contributions, and their contributions constituted a third, some 32 percent of the receipts of all House candidates.

If you just look at nonparty PACs, that is, if you exclude PACs established by party committees, then you are talking about they constitute close to 61 percent of all PAC contributions in that 1984 House race.

By way of comparison, unions contributed, union PACs contributed $883,000 or some 17 percent of all House receipts. [51] They constituted some —

THE COURT: Now when was that?

THE WITNESS: 1984, sir, your Honor.

THE COURT: I am sorry. It's 1.7 million?

THE WITNESS: 1.7 for business-related PACs in 1984. It is $883,000 for union-affiliated PACs. At this juncture, almost a 2-to-1 ratio. Interestingly enough, while the bulk of the business-related PAC contributions in '84 were from committees that contributed between 12,000 and $100,000, that is, some 57 percent of all of the business-related PAC contributions came in amounts between 12,000 and 100,000, there was only one business committee had contributions in excess of $100,000.

In the case of labor, 4 committees out of the 91 that filed in 1984 as having made contributions in the '84 House races for committees accounted for some 71 percent of all of labor's contributions. That is, in essence, labor committees are, by and large, those who are active or those which are active players, are in the process, are pretty much at a level of mature capacity, and I would opine that their growth potential is substantially less than exists in the case of the business-related entities which are new and growing in terms of their PAC-related activities.

Q Mr. Epstein, you have described, in part, Defendants' proposed Exhibit No. 3. Could you briefly describe what it is [52] for the record.

A Yes. The proposed Exhibit No. 3 consists of analyses of the various of the following sources of—the following sources of data: It consists of contributions—it consists of—let me put my hands on it here. It consists of analyses of various sources of data from the state.

I mentioned already the study brought in 1984 by Senator Engler's office. It consists of the computer printouts emanating from the Michigan Secretary of State's office. That includes the receipts and expenditures for various categories of political action committees for the election cycles ending in 1978, 1980, 1982, 1984.

I have also—I have also introduced some comparisons of sources of funds in what is labeled here as "T-Tix (sic)"—excuse me—T-6, Michigan-California comparisons of business contributions.

I have also introduced data from the California Political Action Committee's reports on 1984 general elections to give, once again, just some comparative perspective here. And these are the primary sources of data from which this—these statistics and this analysis results.

Q Is there ~~any in~~formation contained in this exhibit that you have not had an opportunity to discuss today?

A Let me look through it and see if I have brought out the salient points —

[53] MR. BOYDEN: Excuse me. I have got to object to the form of that question. That is about as open-ended as anyone could imagine. I don't understand the thrust of it other than it is inviting the witness on some sort of open comment. I would object on what purpose.

MR. GARTNER: The purpose is the foundation so we can get the exhibit admitted after he explains what it is and what it purports to show.

MR. BOYDEN: Well, he has explained what it is and what it purports to show. The question was, was there something else in it that he wanted to talk about, and I think that is objectionable.

THE WITNESS: Well, okay. There —

THE COURT: Wait, hold on just a minute.

THE WITNESS: Oh, excuse me, your Honor.

THE COURT: Well, I don't see any objection to that. It is certainly not leading. He asked him to look at it to see whether or not there is any—he is not calling anything specifically to his attention. He just asked him if there is anything further in the exhibit that he thinks might be important. I see no objection. That is overruled. All right.

THE WITNESS: Okay. Thank you, your Honor.

A We also show, and this is particularly important to the plaintiff in the suit, the Michigan Chamber. Here I am referring to T-8, labeled T-8 with regard to—it is entitled [54] "Chamber of Commerce versus Labor PACs," and what that shows is expenditures emanating from Chamber-related PACs and comparing that with expenditures emanating from its labor and Chamber of Commerce related PACs. And what we are showing is basically a decline, an expenditure that emanates from labor PACs of from 1978 in the amount of $3,242,000 to $2,080,000 in 1984, as well as pretty much a stable situation in terms of the number of union PACs that there are. There has been a fluctuation in '78 of 102 PACs; in '80, 191; in '82 of 150, and '84 of 160. So I think it is fair to say that the number of union-related PACs caps out at somewheres around less than 200.

In terms of chamber PACs, reduced growth in the number of chamber PACs that reported as so making expenditures as well as the amounts of these expenditures from 41,000 in 1978 to 50,000 in 1980 to 114,000 in 1982 to 134,000 in 1984. It seems to me that that is something that is worthwhile noting on the part of the Court.

In terms of the amounts of money raised, amount of money expended by the various categories of PACs, we did discuss that previously, an upswing in the business trajectory, a downswing in the labor trajectory. I would argue that what we do see is an effective capacity on the part of those

business groups that wish to be very much involved in the electoral political process, and from major industries within this state, they have indeed involved themselves very actively [55] in the electoral political process.

MR. GARTNER: I would move the admission of proposed Exhibit 3.

MR. PERRONE: Your Honor, may we voir dire?

THE COURT: Yes.

Mr. Gartner, do you have copies of the exhibits for the Court?

MR. GARTNER: Yes.

THE COURT: It might be helpful if you would make those available to me. It is very difficult to question a witness about exhibits he is looking at, some exhibit, then some objection is raised about it, and I don't have it in front of me. You know, it makes it very difficult for the Court.

THE WITNESS: Excuse me, your Honor, I thought you actually did have it.

THE COURT: Well, that is not your responsibility. That is counsel's responsibility.

THE WITNESS: I guess it is the reaction of a former practicing attorney.

MR. GARTNER: I apologize, your Honor. I will gather all of them. This is the chart —

THE COURT: Maybe at lunch time you just pull them all together.

MR. GARTNER: Would you like the chart?

THE COURT: Is that what he is referring to?

Epstein—Voir Dire

[56] MR. GARTNER: Yes.

THE COURT: All right. Thank you.

Mr. Perrone.

MR. PERRONE: Thank you, your Honor.

VOIR DIRE EXAMINATION OF EDWIN M. EPSTEIN

BY MR. PERRONE:

Q Mr. Epstein, proposed Exhibit 3 is eight pages consisting of eight tables. Now you've indicated on the bottom of the page various source materials for the information.

A Yes.

Q I notice that you've used the Michigan Department of State Campaign Expenditure Analysis-CF/0030; is that right?

A Yes, sir.

Q These tables include figures that came from that source document?

A That's correct, sir.

Q Does that source document, to your knowledge, only include reported expenditures of political and independent committees?

A Yes, sir.

Q Political action committees?

A Yes.

Q Does it include unreported expenditures in election activities?

A I think by definition the answer is no.

Q That would be referred to as "soft dollars"?

* * *

[63] and incomplete fashion the history of the exercise of First Amendment rights by political action committees with restricted funds. We are not here discussing political action committees; and their experience, whatever it is, is irrelevant whether a corporation should be allowed to speak, and I submit it is irrelevant to this case.

THE COURT: Well, I will concede that it does not speak to this matter of independent expenditures. However, they're—it seems to me that the defendants here have raised sort of a broader issue here that really in fact corporations are participating in a larger scale than one might think, despite the statute, and that conceivably could go to whether or not the First Amendment rights are in fact being infringed; and we may get to an issue somewheres along the line that, yes, they are being infringed, but to what extent. An impermissible amount or not, I just don't know. I don't think anybody has attacked the validity of at least the figures or the accuracy what is here.

I think the Court will—I think there may be some relevance, and I will simply wait to hear from counsel later on as to the specific relevance. It seems to me there is some relevance.

That being the case, the Court will go ahead and receive Exhibit 3 and wait to hear from counsel as to what weight ought to be given to this document, really, if any, as [64] we get down really later on in the case. So, I will go ahead and receive it.

Epstein—Direct

(Defendant's Exhibit 3 was offered and received.)

MR. GARTNER: Thank you, your Honor.

Mr. Boyden made the opening statement today on behalf of the plaintiff. Now Mr. Perrone has voir dired our expert witness. My question is, how many lawyers are going to be examining Mr. Epstein today?

MR. BOYDEN: Your Honor, Mr. Perrone handled the voir dire. Mr. Perrone will handle other aspects of the case. I will be cross-examining Mr. Epstein.

THE COURT: Well, I don't see any objection to one lawyer making an objection, as has been done here. I think the only prohibition of more than one lawyer is if one lawyer does the first part of the cross-examination, and then he gets exhausted and he asks his co-counsel to get up and continue. I think generally that is an unfair advantage. So if the lawyers will stick to one particular witness, they can switch on the witnesses, if they want to. I don't see any problem. I think they're handling that perfectly properly.

MR. GARTNER: Thank you.

CONTINUED DIRECT EXAMINATION OF
EDWIN M. EPSTEIN

BY MR. GARTNER:

Q Mr. Epstein, do you have an opinion regarding the purpose of the statute in issue in this case?

[65] A Yes. This Michigan statute, which really has its antecedence in with the 1913 statute, is an effort on the part of the state to limit the potential of monies emanating from corporations to support, subvert, I should say corrupt, to undermine the integrity of an electoral process. It is one of a number of such statutes that were passed by states around that time following an illustration at the federal level, the Tillman Act of 1907, and it is the integrity of the process point that has been stressed both by the legislature at the time of the enactments in '75 and '76 as well as the understanding of the Supreme Court of this state, both in terms of the original statute, and more recently in terms of an advisory opinion concerning legislative purpose of this statute. This has been articulated again and again and again, the integrity of the electoral process.

THE COURT: Why can't they undermine the integrity of the process through a PAC?

THE WITNESS: Your Honor, that is a great concern to observers of what is taking place at the federal level today. In fact, within the Congress at this time there are a number of proposals, proposed legislation to limit the amount of funds that can—that any single PAC can contribute to the electoral, to a party, to a candidate, as well as proposals to limit the amount of monies that a candidate can accept from PAC sources. This is a great concern in terms of public policy [66] today, your Honor. I know in my own

state there have been very express, explicit proposals to place limitations on the amount of contributions and expenditures that PACs can make, for the reason that you have suggested.

BY MR. GARTNER:

Q Mr. Epstein, have PACs in Michigan corrupted the electoral process?

A PACs in Michigan corrupted the electoral process—from my investigation, the answer is no, I don't see that they have. I have not been exposed to any evidence of their corrupting effect thusfar in what we have seen of active political participants.

Q In terms of political effect, what is the distinction between an independent expenditure and a contribution?

A I think as a practical matter, there is very little difference between an independent expenditure and a contribution. An independent expenditure in the hands made by politically sophisticated individuals or persons, I should say, can benefit a candidate just as well as a direct contribution. Indeed, we have seen at the federal level increasing utilization of the independent expenditure mechanism, particularly on behalf of presidential candidates. In terms of the concern of the legislation, that is the corruption of the process, the maintenance of the integrity of the process, any candidate knows basically who was—who were the parties or [67] who were the principals involved in an independent expenditure committee. And if you want to talk about a possible dependency relationship or symbiosis between those who put money into the process and those who benefit, that is the candidate from running the process, the effect is really the same. Skillfully done, an independent expenditure really doesn't differ from a contribution.

Q What is the PAC —

THE COURT: Let me see if I understand what you are talking about. If a candidate running for office is very careful not to have any direct relationship with this committee but he observes or hears indirectly or whatever that this committee is going to finance his television spots, presumably a major expense for him, you are saying that that would tend to corrupt just as much as sending a check to the candidate and saying, "Here is our contribution. Use it as you wish"?

THE WITNESS: That's right. A candidate knows who sponsors those spots. He has benefited from those spots. At such time as—at such time as perhaps the access to office, he is needed or hopefully a sympathetic ear with regard to a piece of legislation or something of that nature, it really makes little difference whether it was a direct contribution or independent expenditure. The relationship is there. As a practical matter, those entities that have been most involved in independent expenditures, at least our federal experience [68] has shown us, have—they may have totally been within the provisions of the law of not coordinating and not being controlled, just to use the language in the federal legislation, by the candidate or by candidates' committees. But typically there have been very, very close relationships, very often personnel who at one time worked for the candidate or worked for the party is now running an independent expenditure committee. You don't have to break the law for an independent expenditure committee to essentially be able to coordinate its activities with a candidate and to know the timing and the types of ads and the areas in which ads or spots or leaflets or whatever to be disseminated.

So what I'm suggesting as a practical matter, the distinction really breaks down, with all due deference to the Court and the Supreme Court in Buckley, in operating politics, well-done independent expenditures can benefit just as well, perhaps even better, than a direct contribution.

BY MR. GARTNER:

Q What is the dependency relationship that you referred to?

A Well, under our system of campaign financing in this country, that basically we are in a situation where campaigns run very, very expensive. We have limited amounts that individuals and political parties can put into the process, yet at the same time to run effective campaigns—and this is true in the State of Michigan, a fairly large state—candidates [69] have to have monies to do this, and sources of money are a very likely—a very viable source of monies are various social interests dependent upon public official decisions made by elected officials. The officials perforce have to look to the social interests, interest groups for sources of monies. The interest groups have what are candidates perforce for public policy decisions, and what develops is a symbiosis. As I say, it is structured into our system and becomes particularly difficult in these cases where you have office holders who have to run with very great frequency. In some respects they're always running. As soon as they're elected, they're still raising money for the next campaign. In fact, in my own state that has been a very difficult source of problem, off-year fund raising. Candidates will often say to you they don't wish they had to do this. They wish they could be totally uninvolved with the raising of money and having to look to the very people who come before them for decisions, but under our system, this is the way it operates. By saying this, I'm not suggesting that's direct bribery or anything of

this nature. It is a much more subtle, it is a much more systemic type of symbiosis, you know, it is some crude form of black bags, things of that nature. "Black bags" is sort of the caricature that we use of the lobbyists giving money to legislators.

Q Do you have an opinion regarding the justification or rationale for prohibiting independent expenditures?

[70] A The rationale is to essentially prevent the loophole or to close a loophole that would exist if we only said that direct contributions and expenditures were prohibited on the part of corporate entities; that basically if you permitted the independent expenditures, the ability of introducing large amounts of money into the system could become as effectively by that vehicle as it could by the direct and prohibited contributions and expenditures. That is the public policy purpose. Indeed, this is the public policy concern with regard to the implications of independent expenditures. As we have seen in the ballot measures, business, and along with other interest groups, business has been very effective in using the independent expenditure mechanism to get money into the process.

Q Do you have an opinion regarding the rationale or justification for treating corporations and noncorporate entities differently under the Michigan statute?

A I guess it is an historical rationale that—what we have seen over the—what we have seen over the years, that it's been business organizations as a result of their organizational structure, as a result of their access to substantial sums of money that are able to generate funds to contribute or expend into the political process; and this is the concern to which the legislation is addressed.

Q How is that rationale relevant today?

* * *

[76] MR. GARTNER: I can put them in order.

THE COURT: That is what Steve is there for. I think he could find it a lot faster than I could.

All right, Mr. Gartner.

CONTINUED DIRECT EXAMINATION OF
EDWIN M. EPSTEIN

BY MR. GARTNER:

Q Continuing with your testimony, Professor, do you have an opinion regarding the distinction regarding independent expenditures when they emanate from individuals and when they emanate from corporations, is there is a distinction; and if there is, please give your opinion.

A Well, independent expenditures, if they did emanate from corporations, of course have behind them the full source of corporate resources, the corporate treasury, the corporate organizational mechanism, the ability of the corporation to marshal all of these resources.

Also independent expenditures on the part of a corporation are directly instrumental to the business of objectives of the corporation. They are not typically made just in the interest of civic virtue or the public welfare. I mean, they have a very instrumental objective in mind; that is, facilitating the business objectives of the firm. So it is both in terms of what they can bring to bear; also the purposes which they—which they have in mind, and also they bring behind it the weight and the strength and the reputation of the [77] corporation, too, which is an additional aspect or an additional dimension one doesn't find if it is the usual run-of-the-mill individual.

Q If the ban on independent expenditures is lifted, do you have an opinion with regard to the effect on the political process in Michigan?

A I suspect what you are going to find is more active use of independent expenditures on the part of Michigan business corporations. I am not sure that this would come immediately. From experience, both nationally and in, let's say, my own State of California, is that at such point as companies feel that they have used the PAC mechanism to the fullest extent that they want to in terms of direct contributions, it is at that juncture that they are more likely to use independent expenditures.

I think where you would see an increase of independent expenditures is not individual companies, but, rather, trade associations and general business groups, such as the Chamber and/or such as the Michigan Manufacturers Association, because very often companies which are very concerned about the incumbency factor wanting to maintain reasonable access and good relations with whoever happens to be sitting in the Assembly or the Senate or the U.S. Congress, irrespective of the party, will go with incumbents. However, they're more ideologically based or they're proclivities will [78] often be generated or often be expressed through either industry-wide or general business types of committees where basically their own individual component may be lost, but they're able to get the monies to benefit those candidates who they particularly want. We have most certainly seen it in California where you have companies that have contributed directly to Candidate A. We have very strong contributors to what is known as United For California, which is a general business PAC but has very strong ideological directions on how it gives it monies.

So I think what you are likely to see is the independent

expenditures coming from groups, such as the Chamber or general business groups rather than from individual General Motors or Dow Chemical or whatever.

Q Is that of concern to you?

A Well, yes, it is of concern, because you may get a level of independent expenditures operating here that really are much more significant than other social interests can bring to bear, and we'll have the same situation that we see in the ballot issue races where when stimulated or energized or when it is perceived that there is a very immediate economic interest involved, I think the business community has shown itself very capable of generating very substantial amounts of money and getting it through the process.

Q What has been the effect of the State Chamber and its [79] activities in the political process in Michigan?

A Well, perhaps the best source I have for that is the State Chamber itself, and the State Chamber opines in a publication called "The State and Local Chambers of Michigan Working Together in Political Action." That's the Chamber PAC network, "We've made a difference." And the document details such things as the development of some 50 local chambers throughout the state and its activities in generating monies on behalf of particular candidates. Let me be rather specific here by referring to this particular document. They talk about how it took awhile to get started in establishing the Chamber PACs, but now what they have done is developed the state law PAC network. Here are specific illustrations that they bring to bear. They bring to bear their impact on a number of different elections. And I am referring to pages 4 and 5 and 6 in our approach specifically from here. They talk about the election of a race involving Mr. Wilson and Mr. Banich, and in that election they note that the UAW remained the largest

political contributor. However, a new group emerged that is the largest second contributor, the Chamber PAC in addition to the State Chamber's PAC, varied among local chamber PACs making contributions to Wilson, making chamber PACs his largest supporter; and they say chamber PACs as far away as Iron Mountain, and please excuse my pronunciation—"Meneminee"?

Q "Menominee," I believe.

[80] A Well, not too bad.—in the Upper Peninsula, and Boyne City and South Haven in the Lower Peninsula, participated in this targeted race. Combined chamber PACs of over eighty-two twenty-five showed that chamber PACs had themselves emerged as a statewide force.

Chamber PAC involvement was not just restricted to democratic party primaries in '82. In November of '82 the chamber PAC network helped Republicans achieve a net gain of four seats in the State Senate, an additional seat in the State House, and these came not withstanding Democratic landslides at the top of the ticket.

They also speak specifically about the special senate elections in the Eighth and Ninth Districts in 1984 and the—they notice that through the chamber's efforts basically the majority shifted from the—I guess there was a recall of two Democratic senators and a special election in which two Republicans were elected. The State Chamber PAC—I am quoting from page 5 of this Chamber document—contributed the legal maximum to Republicans Rudy Nichols and Kirby Holmes, two pro-business candidates. Thirty-seven other local chamber PACs joined the State Chamber PAC in making contributions to Nichols and Holmes. Over 32,600 was contributed by the Chamber PAC network—

MR. BOYDEN: Your Honor, excuse me. I think this could go on in some length. The question was, "What can you [81] tell us about the effectiveness of the chamber PAC?" I would stipulate that the chamber PAC has been effective. I don't think it is necessary to have this witness read a whole bunch of documents from the chamber PAC itself. We can put the whole document in. So as far as I'm concerned, I would object to the answer being far afield from the question at this point.

THE COURT: Well, I think that it's—it seems to me it is relevant in response to the question. I guess Mr. Gartner can try the case any way he wants to, and if he wants the witness to put in the record material from chamber publication, I guess he's free to do so.

You may continue.

MR. GARTNER: Thank you.

A Well, I see that his Honor has the document in front of him, and I would think that any reasonable review of the pages that I have mentioned here, the document very, very thoroughly, in the chamber's own words, that it has been an exceedingly effective mechanism in generating political support for candidates responsive and congenial to its point of view. And of six GOP challengers to House Democratic Liberals, one received over 21,500. Five of these six challengers won election. And it just goes on and on and on this way, and it concludes as follows: it says, (reading) Chambers of Commerce have come a long way politically in less than four years of time —

[82] THE COURT: Excuse me. What page are you on?

THE WITNESS: Page 6, your Honor, the bottom of the—

THE COURT: Yes, I see it.

A (reading) Chambers have become a tool for the improved business climate in Michigan. We have made a difference. We can continue to make a difference.

Of course this document includes various mechanisms that are used to facilitate local chambers of commerce in terms of everything from telephone information to suggested solicitation forms to the introductory pitch to—delineating the amounts of money that various chambers have put into particular races and, in essence, indicating how it could be helpful and effective to its local constituents in the political process.

It is interesting to note with regard to the Eighth and Ninth congressional seats from this '84 special election, really if you want to talk about network giving, you can see we have looked at only the State Chamber, the top five local chambers of commerce for that election. These are drawn from records filed by each of these entities with the Secretary of State's office, but, indeed, there has been a very coordinated type of contribution effort here. And I get, depending upon your preference, your Honor, I could read the contributions made by various chambers in that State Chamber, and the State Chamber in the Eighth and Ninth races in '84 to establish this [83] or present here as evidence.

Q Just summarize.

A All right. We find with regard to the Eighth and Ninth Congressional, Eighth and Ninth Senate seats, that we have maximum contributions of $4,500 on behalf of Messrs. Nichols and Holmes by the State Chamber.

We find that the Kalamazoo County Chamber gave Mr. Nichols $450. Central Macomb, $200. We find that Mr.

Holmes received from Kalamazoo 450, Central Macomb 400. We find that with regard to the Greater Detroit Chamber, contribution of a thousand dollars on behalf of Mr. Nichols. Grand Rapids Chamber, $4,500. Oakland County Chamber, $1,500.

On behalf of Mr. Holmes, Grand Rapids, $4,500. Oakland County, $1,300. The point is you have chambers across the country—not across the country. Excuse me—across the state making their contributions to this particular targeted race, which is viewed as points by the chamber.

MR. BOYDEN: Your Honor, again, at the risk of interrupting, I think the record ought to be clear. Although the witness keeps talking about chambers, these are chamber PACs.

THE COURT: Yes, I certainly understand that. I assume the witness does also.

THE WITNESS: I understand that. But in looking at the materials submitted by the chamber, the separation of the [84] two in terms of its constituency and the separation of the two in terms of being viewed as mechanisms of or instrumentalities of the business community—

MR. BOYDEN: Your Honor—excuse me, Mr. Epstein. Is there a question before the witness that has allowed him to go forward into this particular data? I didn't hear one.

MR. GARTNER: I believe he was continuing with his answer to the question I asked.

THE COURT: I think if—it is not the most easy and

comfortable way to communicate, with questions and answers. Lots of people obviously that aren't communicating in that form find it a little awkward. But, nevertheless, that is the tradition you follow in the court. So if you will listen carefully to see if there is a question pending, and then try the best to answer it.

All right, Mr. Gartner.

THE WITNESS: May I say, your Honor, I thought I was responding to the distinction between the chamber and the PACs in attempting to show in the chamber's own materials, they merged together these—

MR. BOYDEN: Your Honor, excuse me. Again, whatever it was that Mr. Epstein was attempting to do, it was not in response to any question, but, rather, in what he took to be a response to my objection. That is what I objected to, that is what I thought the Court had just instructed him about.

* * *

Epstein - Cross

[92] right of free speech or advocacy on the same terms as business corporations; is that true?

A Under Michigan law, they do not have to create PACs.

Q That is a difference in treatment, is it not? We can certainly agree with that. Is that true?

A Yes, it is.

Q It is a restriction, at the very least, of what, when and how a corporation can exercise a right that the Constitution says is guaranteed; is that true, sir?

A Well, it is a constraint.

THE COURT: It is a what?

THE WITNESS: A constraint.

BY MR. BOYDEN:

Q Is it also a restriction?

A It's a restriction.

Q Thank you. Are you aware, sir, that labor unions are normally felt to be politically aligned on a partisan basis with the Democratic party, and particularly so in Michigan?

A Yes, I understand that.

Q Are you aware, sir, on the other hand—

A Let me go to your question of the Michigan situation.

Q Okay. On the other hand, particularly again in Michigan, business and corporate interests are generally thought to be aligned with Republican party politics; are you aware of that?

A I am aware of that.

* * *

[117] yourself to answering my question.

A My apologies.

Q I have gone ahead and let you go well past the yes or no's I've requested, but I would like to at least have the question answered.

A Thank you. My apologies.

Q Okay. You would agree, would you not, Mr. Epstein, that corporations and business in general have a vital role to play in American politics within our pluralistic industrial society?

A I would.

Q You would agree that the societal role has at least two parts: one, of course, is the self-interest part, to promote the interest of the corporation and its shareholder; and then to preserve the public's interest in receiving the business viewpoint, and then having business interact in public policy formulation, would you?

A I sure would.

Q That is especially true in economic issues?

A Yes, sure.

Q That is the area, after all, in which business and corporations operate, the economic area?

A Well, they would operate in the economic area, but they have great sound political and social ramifications also through their activities.

Q Would you agree, Mr. Epstein, that the evidence from other [118] states in the federal experience do not show independent expenditures to have a corrupting impact in terms of creating a dependency relationship between businesses and legislators?

A There is very little evidence about independent expenditures.

Q Whatever that is, it doesn't show any corrupting influence, does it?

A To date, no.

Q Thank you. You are concerned, I am sure, as a political scientist who has training in the law and knows about constitutional laws and I am sure treasures your rights and freedoms, you would agree in a democratic society there must be a close look at any limitations placed upon political activities; is that true?

A That is true, sir.

Q Do you recall the criterion that you posed in your book "The Corporation in American Politics" back in the late '60s?

A I don't quote it to you verbatim, but I gave, I think, a reasonable paragraph of it a few minutes ago, yes.

Q Let me quote it from your book for both our benefit. "Should be judged by the following criterion," you said: (reading) such limitation, quote, does the nature and the quality of political participation by any given social interests, whether individual or collective, or combination of interests, threaten unduly to deny on a continuing basis to

* * *

[127] committees with some suspicion?

A That is correct.

Q Okay. Would you agree with me, Mr. Epstein, that as much disparity as there is and the kinds and types and natures of corporations, that if one accepts your statements that PACs or their alter egos, there are basically just as many differences and distinctions between corporate PACs as there are between corporations?

A In terms of the types of entities with which they're associated?

Q Yes.

A Yes.

Q Okay. And you have agreed that indeed the conception of corporations is not monolithic, but, instead, is richly varied; is that true?

A That's correct.

Q Indeed, in one of your works you wrote that the term "corporation" is a broad conceptual category encompassing highly diverse entities with widely differing societal roles; is that true?

A That's correct.

Q Okay.

A Just like with labor unions.

Q Labor unions, though, you would agree with me, would you not, have a tendency to be considerably more towards monolithic

* * *

Epstein - Redirect

[144] of money." You were asked whether you agreed or disagreed with this statement, and you indicated you did not agree with it. Would you please explain your answer?

A Well, it goes to the point we were discussing in the morning, that independent expenditures skillfully used by political professions that can time them well, that can place them well, that can have them—have the ads in the media at the time that is most useful for a candidate's campaign—the candidate doesn't have to tell them. If anyone has been running political campaigns for 20 years, they know when it is good to place an ad. It is better to place an ad a week

before an election or a month or two months before an election. If skillfully used, they can have exactly the same impact as a contribution. And we have seen in a number of races across the country where that has been done.

Independent expenditures played, for example, an important role in the Helms-Hunt debate election, the last election cycle. These independent expenditures committees were made up of very skilled professionals who knew where to place the ads, when to place them, what the impact of these ads was going to be. And in terms of their relationship with the Senator, it doesn't make any difference whether it was an independent expenditure or a contribution. It's—it has really the same effect.

Q On page 160 of the California Gold Rush, it reads that [145] (reading) Independent expenditure committees may not be truly, quote, independent, close quote. Elizabeth Drew has concluded, quote, there are all manner of ways in which people running independent campaigns can run them in tandem with the candidates, and there are all manner of ways in which without the candidate or his top aides necessarily getting involved, the independent committees and the campaigns can and do collude. (end of reading) Do you agree with that statement, and what are your reasons?

A If you have skilled professionals operating an independent expenditure committee, they don't have to break the law to work very effectively together. If—they don't have to break the law to work effectively together, for the reasons I was suggesting. They know what the—they know the amount of money that the candidate may have. They know how the candidate is likely to use that money, because of their own past involvements, breaking very often with that particular candidate, and know where they can best get the bank for the buck in terms of how they use their monies. I

mean for the politically sophisticated, you don't have to break the law to work.

THE COURT: I suppose in a close election skillful people are going to know that the Ninth and the Twelfth precincts are the key to winning an election in Grand Rapids, for example?

[146] THE WITNESS: Yes.

THE COURT: So this independent committee, without going anywhere near the candidate, we don't care what he does or how he spends his money, but we will concentrate our money on those two precincts, regardless of what he does. I take it this is the kind of thing you are talking about?

THE WITNESS: Yes, that is what I am talking about. And the references that they made here in terms of what would be, well, of course some screwball effects of independent expenditures, are for, so, you know, so the law of canons that sometimes gets into the electoral process, not for the political professioals that are running this thing; that somebody falls in love with a candidate or violently opposed to a candidate, and, you know, runs crazy ads, and, you know, essentially hurts the candidate. That can happen. But these don't occur in the hands of really politically sophisticated groups, such as the Chamber, or if the unions are going to use independent expenditures to any great extent, they wouldn't be running like whose canon off here, nor would the Chamber, nor would the—you know, NCPAC is another proposition.

Well, I just wanted to give you the name of some independent expenditure committees, Fund for a Conservative Majority, somebody of that nature. They know what they're doing and they know best how to do it.

BY MR. GARTNER:

* * *

(Witness: Woodward Sidney Smith)
Smith - Direct

[170] particular lawsuit, is it your understanding that we are here in an effort to allow corporations to engage in what have been identified as independent expenditures the same as such societal interests as labor unions may do?

MR. GARTNER: Objection, Your Honor. It is as to the form of question, because, as I discussed, on Friday, the statute does not apply in that manner. The statute applies to corporations and noncorporate entities, and it is erroneous to distinguish between corporations and labor unions, as Mr. Boyden is doing.

THE COURT: Well, why don't you see if you can rephrase the question, Mr. Boyden.

MR. BOYDEN: Surely.

Q Mr. Smith, what do you understand the thrust of what we are asking the Court to do here in this lawsuit is?

A My understanding of the thrust of this lawsuit is that my corporation have the right to speak in political matters and that I be treated as equally as a partnership, as a labor union, or as anything else.

Q In this particular lawsuit, Mr. Smith, we have heard from the expert for the defendant who has indicated, among other things, that corporations are able to speak on behalf of business and therefore business is able to speak on a parity with such societal interests as labor unions, because they can form political action committees or separate segregated

funds [171] in order to make independent expenditures. Why has W. S. Smith Company not formed a PAC to give voice to those things that you have indicated it wants to give voice to?

A Well, to begin with, any PAC that would be performed by the W. S. Smith Company I can see one sole contributor, and that is myself. I don't feel I am in a position to ask my employees or to demand that my employees put money into a W. S. Smith Company PAC. Those are after-tax dollars to me, especially when my corporation has the issue in front of it. I feel there is a great deal of paperwork that has to be done, which is an additional expense to my corporation. There are other controls that I am sure the State would levy on us or already have on PACs, and I am quite familiar with all those controls. So I just feel that—I feel that it is a blockade. I have always felt that way. I think the PAC itself a nice thing, but it certainly doesn't represent me and my issues when it comes to local politics or things that affect directly my company.

Q How do you feel about the public credibility of PACs as opposed to the corporations speaking in their own voice?

A I think there is a credibility problem with PACs. I don't think that the original intent of the PAC was to have that, but I do believe that PACs have been publicized to have that kind of problem, that they basically do have a credibility problem. I think a corporation that has a [172] particular issue does not necessarily represent a credibility problem.

Q One of the points again the defense expert made in this case was that small corporations, such as yourself, W. S. Smith Company, can go ahead and accomplished individually those kinds of things that would otherwise be done by a larger corporation forming a PAC. As a matter of fact, the

W. S. Smith Company does business in a variety of communities across the State of Michigan; is that true?

A That's true.

Q And in those communities, the W. S. Smith Company name is not even known, at least to some extent; is that accurate?

A Yes, I would say that is correct.

Q But the name Sidney Smith, I assume, would not have the same recognition or credibility; is that correct?

A It would not.

Q Okay. With respect to the whole situation of what you understand the Chamber to address and even the Chamber PAC, does it and is it able to address the particular interests of the W. S. Smith Company?

MR. GARTNER: Your Honor, I will have to object to lack of foundation. Mr. Smith hasn't indicated any familiarity with the Chamber PAC.

MR. BOYDEN: I agree. I will rephrase the question.

Q With respect to the Chamber of Commerce itself, laying [173] aside the PAC, Mr. Smith, would you please indicate whether or not the Chamber is able through its activities to represent the particular interests of the W. S. Smith Company?

A To some degree. They certainly represent the interests of my corporation as well as others on the State level. Where I run into a major problem is when I am in, for instance, Marquette or Grand Rapids or Holland or Muskegon or Buchanan and we have a local issue, such as maybe an

increase in millage rates to fund some things that are just absolutely gong to have to be passed on to the renters of my project, I need a view of that, and I can't ask the State Chamber for $100 a year to come down and defend my particular issue. My corporation can't defend it because of this law, so that leaves it to me, and I don't quite feel that is fair.

Q With respect to corporations' inability and particularly the W. S. Smith Company's inability to make independent expenditures with respect to its political views, how do you feel about that being justified under your concept of our political system?

A I am sorry, Joel, could you repeat that?

Q Sure. You understand there is a disability on the part of the W. S. Smith Company to make independent expenditures; is that true?

A That's true.

Q Why is that unfair?

* * *

(Witness: H. Richard Mayberry)

Mayberry - Direct

[236] the federal scheme as to the labor community was subject to the ban on expenditures.

So as of 1947 both corporations and labor organizations were prohibited from making contributions and expenditures in connection with federal elections.

Q What is the present day situation; has it changed from the mid '40s?

A It has not.

Q Okay. Would you please indicate to us what differences there are which would support any kind of a disparity in treatment of corporation interests, business interests, on one hand, and labor union or other similar interests, on the other hand, with respect to the issue of independent expenditures?

A I can think of no characteristics or reasons why the two would be treated differently. There is every reason as a matter of public policy to treat them both the same and to give parity to corporations and labor organizations under the election laws to create a competitive environment and to promote and encourage political activity by both so that we can get a greater flow of information on the issues of the day to the electorate and the citizens who will be called upon to cast an informed and intelligent vote on election day.

THE COURT: Would the financial ability of these corporations or unions make some difference? In other words, if you—I am sure unions get their money out of dues, but I [237] suspect that a union treasury isn't going to look like General Motors' treasury. Is there some reason to think that they should be treated differently if you look at their financial resources?

THE WITNESS: Your Honor, I don't believe so. Both are the foundations of our economic system, and in their ability to participate within the electoral system, in my judgment and as I have read Buckley versus Valeo and the United States Supreme Court judgment, it is not a constitutionality permissible reason in order to distinguish their treatment under the election laws.

THE COURT: Well, you see frequently in the cases reference to the fact that corporations have traditionally in some respects, at least, been treated differently than noncor-

poration entities; that is, corporations are given—they're created by statute, they're given certain benefits, they're given liability, they're given other benefits that are awarded to them. That being the case, is there anything to the argument that since they're given these benefits, in an effort to avoid implication of improper expenditures or of buying elections, the perception of dishonesty, that they can somehow be treated differently?

THE WITNESS: Both corporations and labor organizations are afforded privileges within our society; that is, the ability to have compulsory dues and the ability to [238] sell product and to capture the proceeds in a treasury enmassing economic wealth.

In my judgment, I have great confidence in the American people, for the people in the State of Michigan, that if there is proper disclosure in terms of who is making the expenditure in what amount, that the voter is able to make an informed decision and to read the allegiances of the candidate in terms of who they are receiving money from; or in the case of independent expenditure, since there is no consultation and there is less potential for corruption—and I don't believe independent expenditures have a corrupting influence. In fact, I think it's just the opposite. It is good government because the of the intermeshing robust debate that they cause. The citizen voter is able to make a judgment with full disclosure and, quite frankly, cast a vote for or against the candidate based on who the citizen views their allegiance of the candidate may be to, whether it be the labor community, or business, or Republican or Democratic or nuclear freeze issue or whatever the particular affiliations of the candidate.

So, in other words, if you disclose who makes the expenditure in a timely fashion,; for example, with independent ex-

penditures, you have a notice paid for, in this case, by the Michigan State Chamber of Commerce in terms of the public advertisement, political advertisement that the Michigan State Chamber wanted to run. When that runs the [239] reader is able to clearly see. It is conspicuously stated on the advertisement who made it and to form their own opinion in terms of as the Court is judging my credibility, the citizen can judge the credibility of the person making the independent expenditure.

THE COURT: All right, thank you.

THE WITNESS: I was just thinking that the government in the sunshine, in electoral—electoral activity in the sunshine has a great disinfective effect, because it's in—we are talking about activity highly visible in which people involved with it are fully identified.

So I think, from my observations, that the citizens can make their own mind up on the issues.

BY MR. BOYDEN:

Q Mr. Mayberry, Judge Hillman has raised an issue that I intended to cover a little bit later, but let's talk about it now since I think it is appropos to the line of inquiry of the Court. You were present at both Mr. Epstein's deposition testimony and his testimony here in court, and you heard him indicate that corporations and corporate PACs are essentially fungible, and that PACs can accomplish for the corporations that which the corporations can accomplish. You heard that testimony, is that correct?

A Yes, I did.

Q And that would lead, I think, to the conclusion that

Mr. [240] Epstein also adopted, and that is that the contribution or participation level of corporations through their corporate PACs is about what it would be through any kind of direct corporation activity; true? That is what he basically said?

A Yes.

MR. GARTNER: Objection, Your Honor. I don't recall that testimony by Professor Epstein.

MR. BOYDEN: Well, I guess it is a matter of record one way or the other. That is certainly my indication and recollection of what he said.

THE COURT: Well, perhaps maybe to be on safe ground, "assuming that this is what the record would say."

MR. BOYDEN: I think that is a good point, Your Honor,.

Q Assuming that the record would establish that Mr. Epstein indicates a belief that the participation in election activities by corporations is not affected by the necessity for PACs, if they participate to essentially the same extent under PACs as they would under a direct allowance, Assuming that to be so, have you made some comparisons based upon the federal scheme of things, the federal election law in contributions between the corporate PACs, on the one hand, and the labor PACs, on the other?

A Yes, I have.

Q In fact, if we could direct the Court's attention to tab

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Mayberry-Direct

[274] has to be added to for an aggregate figure to arrive at the 20-million dollar figure.

Taking a look at the starting point, what The Federation, the umbrella group, was spending in 1976 to identify their members so they could communicate for political purposes, they spent 262,000, over $262,000. On registration drives they spent $459,972 —

THE COURT: Excuse me again. Are these figures I will find on these charts?

THE WITNESS: Your Honor, the figure on the chart is $20,000,000, the value, and this is my Table 2-A. In order to test that figure and to come up with the reasonableness of it, I have examined other documents, including the stipulations in the RNC case as well as the Epstein scholarly writings and other scholarly writings, such as Professor Alexander of USC.

BY MR. BOYDEN:

Q Mr. Mayberry, if I may interrupt you, based upon all of those double-checks, you are satisfied that the estimates given on Table 2-A, which came from other sources, are accurate and, if anything, underestimated; is that accurate?

A Absolutely.

Q If you add those soft dollar amounts to the amounts testified to by Mr. Epstein and as reflected in the spending in federal elections illustrated on Tables 1-A and 1-B, what does that do for the total comparative amounts between labor unions, [275] on the one hand, and corporations, on the other?

A Well, what I think you will find here is that when you take the hard dollar expenditures by the corporate community, which are reportable by law, and you compare them with the hard dollar activity of the labor community, which is reportable by law, for example, 26.1 million dollars in hard dollar activity by the labor community —

THE COURT: Hold on just a second. Let me just interrupt.

MR. BOYDEN: Hold on a second.

THE COURT: I am trying to take notes here. I get the question down and I am looking for an answer. The question was, if you take the hard dollars that apparently are already in evidence here —

MR. BOYDEN: In Tables 1-A and 1-B.

THE COURT: — in Tables 1-A and 1-B—

MR. BOYDEN: And add the soft dollars to it.

THE COURT: — and add the soft dollars to it, comparing the labor and corporation, what do we come up with? I guess that is the question.

THE WITNESS: What we come up with, it would appear that there is some type of parity or equity or reasonable ability of these two economic interests to compete based on an evaluation of what their political activity is.

BY MR. BOYDEN:

* * *

[297] A No, I don't.

Q I will share with you my copy.

A Yes.

Q Does T-4, as prepared by Mr. Epstein from the figures of the political action committees in Michigan, indicate a fundamental difference in the subject of the expenditures by corporations, on the one hand, and by labor unions, on the other?

A Yes.

Q What does it indicate?

A The Epstein chart indicates that labor gives almost exclusively to democratic candidates, 98 percent of their expenditures. This is in stark distinction to the business community, which is bipartisan in support of its candidates, giving approximately half to republican candidates and approximately half to democratic candidates.

Q Again the exact expenditures are 52 percent for Republicans of business expenditures, 49 percent for Democrats; is that accurate?

A Yes, it is accurate.

Q Now, Mr. Mayberry, if we accept the hypothesis that was put forward by Mr. Epstein, that the removal of the ban on First Amendment freedoms on corporations would in fact increase the activity of corporations in the form of expenditures, do you have an opinion, if we hypothetically accept that, would [298] that benefit both political parties equally and simply serve to stir more awareness and healthy debate, based on Mr. Epstein's figures and findings?

MR. GARTNER: I am going to object to the form of the question. It is a leading question.

MR. BOYDEN: I asked if he had an opinion.

THE COURT: That is overruled.

Q Do you have an opinion, Mr. Mayberry?

A Yes, I do.

Q What is your opinion?

A Well, based on the Epstein tables, it would appear the expenditures would go to both Republican and Democratic candidates in roughly equal forum.

Q Turning your attention back now to Exhibit 4-B and that portion of the table with the conclusory graph, Mr. Epstein indicated in his testimony that corporate PAC expenitures increased in Michigan at a higher percentage than dollars spent by noncorporate PACs in '82 and '84 election cycles. What can you tell us about that, based upon the State's own proposed exhibit in 4-B?

A I am sorry, could I see that exhibit?

Q Sure. That is the one you referred to before. It is appended to the end of the computer printout, that one.

A It would appear that there is approximately twice as much spending by the noncorporate and labor groups as there are for [299] corporate PACs.

Q What about the rate of increases over the '82 and '84 election cycles for the two components?

A There by the State's figures there appears to be a decrease in coporate PAC spending from 2.8 million to 2.7 million.

Q Okay. And how about for noncoporate interests?

A There appears to be a decrease in noncorporate PAC spending also.

Q In about what amount?

A 4.1 million in 1982 to approximately 4 million in 1984.

Q Okay. So each decreased approximately how much?

A Approximately $100,000.

Q All right. You heard Mr. Epstein testify that all corporations in Michigan have the effective capacity to establish and administer a political action committee in the state. Do you have an opinion with regard to that?

A Yes, I do.

Q What is your opinion?

A I disagree with Mr. Epstein on that point.

Q Why?

A For a number of reasons. First, there is a cost associated with formation, administration of a PAC. The costs are estimated from 25 percent to 50 percent of the amount of money which is spent by a political action committee. [300] Therefore the smaller corporations, the medium-sized corporations, are unequal in terms of their ability to have the resources to form and administer a political action committee.

Second, a number of corporations have chosen not to use the PAC vehicle due to the — there is a quantum of social programs, which is attached to the use of PACs because of the popular —

Q Slow down.

A In other words, the public is critical of political action committees. They have been cast in a negative image by the national press, so a number of corporations have chosen not to use a political action committee device.

Lastly, it is cumbersome and it forces a corporation to create a separate legal entity and another organization to undertake an activity. It is very expensive. So many corporations have chosen not to use a political action committee.

Q Okay. You heard, since you were present in court, Mr. Epstein respond to a question by Judge Hillman to the effect that a political action committee has an equal potential to undermine the political process as any other source of political expenditure; do you agree with that statement?

A Yes.

Q Given that agreement, do you agree then with Mr. Epstein's [301] testimony that with respect to whether an activity is carried out by a corporation or a corporation's political action committee, the net effect, if you assume corruption or appearance of corruption, is going to be about the same?

A Yes.

Q Do you agree with Mr. Epstein's testimony that there is no evidence of corruption or appearance of corruption by political action committees in Michigan?

A Yes.

Q Mr. Epstein has characterized corporations and corporate political action committees as "fungible" or as "alter egos." Do you have an opinion as to the accuracy of that claim?

A Yes.

Q What is your opinion?

A I believe the corporation and a PAC are, looking at them functionally, they are separate and distinct since they have different sources of funding.

Q Therefore are they fungible?

A No.

Q Are you familiar with proposed Exhibit No. 7 in this case, which is a report entitled "Managing Corporate Political Action Committees"?

A Yes.

Q Do you consider that work, as published by "The Conference Board," to be accurate and authoritative?

[302] A Yes.

Q Is it considered to be accurate and authoritative in the field of election law?

A Yes.

THE COURT: Which exhibit is this?

MR. BOYDEN: This is proposed Exhibit 7, your Honor, entitled "Managing Corporate Political Action Committees."

Q Have you in fact referred to it in order to be prepared to testify in this case?

A Yes.

Q What does that study or report have to say as far as comment about the idea or proposition that corporations and corporation political action committees are one and the same?

A That report would indicate — indicated that they are treated differently by the business community.

MR. BOYDEN: Your Honor, at this time I would move for the admission of exhibit, proposed Exhibit No. 7 into evidence.

MR. GARTNER: Could I voir dire Mr. Mayberry for a moment?

THE COURT: Yes, you may.

VOIR DIRE EXAMINATION OF H. RICHARD MAYBERRY, JR.

BY MR. GARTNER:

Q Mr. Mayberry, is proposed Exhibit 7 a document you prepared?

[303] A No.

Q Who prepared this document?

A The Conference Board.

Q And isn't it true The Conference Board is a business information service whose purpose is to assist senior executives and other leaders in business?

A Yes.

Q And isn't it true that members of The Conference Board consist solely of businesses in the country?

A Yes.

Q Isn't it also true that the greatest share of its financial support of The Conference Board comes solely from business concerns?

A I believe so.

Q Do you know the date of this article?

A 1986 is the copyright date.

Q Do you know how the information and the tables that are contained in the article, do you know how these tables, the information contained therein, was obtained?

A Yes.

Q Do you know the author?

A I know of The Conference Board.

Q Do you know Catherine Morrison?

A I do not know her personally.

Q So you have never spoken to her, talked to her?

[304] A I have not spoken to Ms. Morrison.

MR. GARTNER: Your Honor, I don't have any objection to this document being admitted for the purpose it is going to be brought in.

THE COURT: All right. It is received.

MR. BOYDEN: Thank you, your Honor.

(Plaintiff's Exhibit 7 was offered and received.)

CONTINUED DIRECT EXAMINATION OF
H. RICHARD MAYBERRY, JR.

BY MR. BOYDEN:

Q As a result of your experience and your training and your background in the election law field, Mr. Mayberry, do you have an opinion relative to the public perception of and about political action committees?

A Yes.

Q What is your opinion?

A There is a public perception that there is—that is critical of political action committees and their role in the political system.

Q How, if at all, would that affect the relative ability of a corporation, on the one hand, or a corporation's political action committee to effectively communicate its thought by independent expenditures?

A This public perception is a deterrent to a corporate entity forming a political action committee in order to make independent expenditures.

[305] Q Speaking of deterrents, how does the cost of corporate political action committee administration—putting it another way, the administration costs of corporate political action committees compare to average administrative costs of corporations?

A They are superior or larger. The costs are very expensive to raise these voluntary dollars, 25 to 50 percent. It really depends what life cycle of a PAC you are studying. In the early informative days, years, it can be up to 100 percent or more than 100 percent of the amount of contributions are expended in information costs, administration costs.

Q Having in mind those higher administration costs, do you have an opinion as to whether or not that factor alone presents a substantial negative as to whether or not a corporation would form a corporate political action committee and engage in independent expenditures?

A Yes.

Q What is your opinion?

A It is a substantial deterrent to corporations, especially the smaller corporations, closely held businesses, but also some of the middle-sized corporations.

Q In fact, having in mind some of those factors we have reviewed, would all corporations, all Michigan corporations have the ability to establish and administer a political action committee?

[306] A No.

Q If we accept Mr. Epstein's theory or thesis that corporations and corporate political action committees are both "fungible," what reasons can you think of, based upon your experience and your training and your background in this field, as to why a political action committee is less likely to subvert or corrupt the integrity of the electoral process than a corporation acting on its own with respect to independent expenditures?

A I can think of no reason.

Q Now let's see if we can dispense at this point with discussions about political action committees. You heard Mr. Epstein indicate in the course of his testimony —

THE COURT: Excuse me. Let me just interrupt for a minute on that last question. Wasn't—as I looked at some

of that earlier material, wasn't it the sort of outrageous conduct of corporations in earlier years, buying city councils and state legislators, and then all the large corporations that got caught in the Watergate scandal, pleading guilty to making illegal contributions, was it to CREEP, the Committee to Re-Elect the President, and huge corporations like General Electric and other well-known corporations that pleaded guilty, now isn't there a public image of wrongdoing by public corporations if they're not some way regulated, wasn't that the whole purpose of this statute, to avoid the impropriety of [307] corporations buying candidates?

Now you say—I ask a question and then I go on and don't give you a chance to answer. That's one of the prerogatives of being a judge.

MR. BOYDEN: The other negative is the lawyer can't object to the judge's question as to the evidence that is coming in in this case, but I acknowledge it is a prerogative.

THE COURT: Which reminds me of the story of the judge who was asking a lot of questions. The lawyer said, "Judge, I don't mind you asking questions, but don't lose the case for me."

Well, so they go into this PAC in order to avoid that bad corporate image. Now historically it seems to me this is how this all came about. Now you are here as an expert, and you say, well, no, that is not true at all. The PAC somehow has a bad reputation and corporations don't. If corporations could spend freely, this bad image wouldn't exist.

Now I am not sure I understand. What's happened?

THE WITNESS: Several things have happened. There is a public concern, as when Tony Boyle, United Mind Workers, was convicted and served a prison sentence for commingling union funds in the labor community. There is a public image with all economic interests, corporations and labor organizations in terms of what is their proper role within our political system. The proper role has to be—in terms of a perspective, is what [308] I would call "prehistoric" and "historic." Prehistoric is virtually anything from the beginning of our country to 1976, including the Watergate era, because in 1976 the Supreme Court passed upon in Buckley and Congress through legislation codified the Buckley opinion. We entered into the modern era of campaign finance. What has changed between prehistoric before 1976 and after 1976 is that the—is the principle of disclosure and contribution limitations have been put in place. The law has been enforced. They have been tested and they appear to work. In other words, what in my judgment, what is most important is that there is disclosure to the electorate who is spending money, whether it is a corporation or a union; that disclosure has a disinfecting effect in terms of the public concern for the economic interest participation.

By imposing a limit on what the quantum of the contributions are and then disclosing what they are, then you have a knowledgeable public that can poll the land and know the allegiances of a candidate.

As I understood the question, it went to, in terms of the political action committee dollars or whether they're tied to a union and its PAC or a corporation to its PAC, there would be the same level of concern or lack of concern, there would be the same potential for corruption for either of those. So the question goes, what is the level of corruption?

I would suggest to the Court that properly [309] disclosed, that goes to timing early enough, close enough to the time an

expenditure is made and early enough in an election cycle with a widespread disclosure to the electorate, which is a function of appropriate disclosure collection of data from the central depository where the figures and the data are collected along with a policing function by the government, and what the amounts are would relieve the corrupting effect from these economic—the economic interest money.

THE COURT: Let me just interrupt. I am not sure there isn't some good logic to what you are saying, but shouldn't this be addressed to the legislature? Isn't it the legislature, shouldn't you be pointing out to the legislature there is an unfairness here, there is an image. They ought to change the law?

THE WITNESS: I would agree with that except where the legislature has violated the constitution, then it is the duty of this Court to apply Buckley and to rectify the unconstitutionality of, in my judgment, this section of the Michigan law. Buckley was clear. You cannot equalize groups by imposing different restraints on them. They had to be treated equally. That would appear to be the full thrust of the Michigan statute.

THE COURT: Thank you. Mr. Boyden himself couldn't have answered that question any better.

MR. BOYDEN: I would agree, your Honor.

[310] THE COURT: Let me ask you this—this is another advantage the Judge can take—Since we have been having some late documents offered, I happened to see in the paper this morning—that is even later than the document you tried to offer, Mr. Boyden—in which the House Speaker has appointed a bipartisan committee to trace hundreds of thousands of dollars being funneled into Michigan political campaigns by national political action committees, PACs. It says, "The effect of PAC money is magnified this year because groups supporting potential Republican presidential candidates are spending hundreds of thousands of dollars in Michigan to recruit GOP precinct delegates.

"On May 22, the Michigan Fund for America's Future voluntarily disclosed that it had spent $51,000 to help 47 GOP candidates in Michigan," and so forth.

"Owen, a Democrat from Ypsilanti, said that much of the money contributed to Michigan candidates goes unreported, so it is nearly impossible to trace how much money was contributed and which PACs made the contributions," et cetera. Now that obviously isn't directly germane here, but that is why I—there are obviously some loopholes in this whole PAC business. That is what I think prompted my question to you a moment ago as to whether or not we are not faced with a legislative problem here. If this gentleman is correct, the efforts to clean up the system through PAC doesn't seem to be [311] working very well either. I don't know whether he is correct or not, but the whole theory of PAC, as I understood it, was that you would be able to find out where the money was coming from and how much was being spent. At least according to this article in the news this morning, there are big loopholes in the PAC system, too.

THE WITNESS: Your Honor, one thing I would suggest to the Court is that—this alludes to the guide, again, of the Supreme Court in dealing with this whole campaign finance area, is that purposely it has created huge loopholes because, it says, the First Amendment requires it and demands it. So we have to be cautious in terms of whether loopholes is a pejorative term in the area of campaign finance. I would suggest that in the area of independent expenditures

where the Court said that there is no corrupting potential, that the ability of the state to prohibit corporations from making independent expenditures would violate the First Amendment, and that the Court is suggesting that this is a loophole opening area with independent expenditures, it is slightly different than the disclosure function in which there is close to universal agreement within the scholarly community with practitioners by government agencies, that there should be disclosure, as effective disclosure as is possible. I would agree with the Court that there are loopholes that are in a negative sense in terms of what is the totality of what is [312] being captured. For example, the whole union soft dollar program is beyond the keen of the public disclosure and is unknown. And as we found from my own testimony and Mr. Epstein's, it is best guess, best estimates, and it is a whole subterranean political action which is not known to the general public. Independent expenditures are visible and they're known by the public and they tend to encourage debate.

So, they're something different than the subterranean activities.

THE COURT: Well, why don't we go back and let Mr. Boyden try his own lawsuit.

All right, Mr. Boyden.

MR. BOYDEN: Don't mind at all. In fact, I will piggyback on one of the Court's questions.

Q What is the identity or the allegiance of the largest most active political action committees nationally, who are they, what kinds of organizations?

A Well, of the top ten PACs in the United States at the federal level, I believe six or seven are labor organizations.

Q Okay.

A This has been a trend for a number of years. They have been in the top ten in terms of making contributions on the national level.

Q Whatever the situation with political action committees, is your understanding what we are involved with here is simply [313] a question of the right of a group to make independent expenditures on an equal basis with other entities; is that accurate?

A Yes.

THE COURT: That raises another question I was thinking about during this month recess that we have had. I would think generally on a board of directors you are going to have a group of people that generally think socially and politically and economically in the same vein. Not always, but generally speaking. If you are a businessman and you are going to increase your boards, you are going to be getting other business people on your board to help you run your company, so that when a corporation decides that they want to spend money on an independent expenditure for—to defeat Congressman X or whatever, I think—my guess would be that generally speaking you wouldn't have a big internal fight on the board of directors, but in the labor field, more and more aren't the members of the labor unions raising objections to their dues being spent for political activity? You get hundreds of thousands of members and you are going to get—they're going to range, the whole spectrum in their political views, and if you are a Republican and the Board of Directors of the Union decides to spend the money on behalf of some Democratic candidate, you are not going to like it. I have already had a number of those cases in my court. Of course the Supreme Court [318] issue, whether political action committees should carry out a corporation's election-related activities?

A Yes.

Q What is your opinion?

A I don't believe they should.

Q Why not?

A It's a different representative—why eliminate the simplest and most direct form of political communication and permit and encourage an indirect, the same thing indirectly. That does not make sense.

Q It does to me and I hope it does to the Court.

With respect to Mr. Epstein's testimony about contributions and independent expenditures, he testified that there is, quote, "Very little difference between an independent expenditure and a contribution," close quote. Do you agree or disagree?

A I disagree.

Q Why?

A It is apples and oranges. It is black and white. There are all the differences in the world. You start with—what you are talking about, money versus speech, contribution generally takes the form of a check from a spender to a candidate; an independent expenditure generally takes the form of a public advertisement. The checks are less visible than the advertisement. The advertisement will carry disclosures, [319] who it was paid for, whether it was authorized by a candidate, who paid for it. It will generally raise an important election issue. By raising the issue before the electorate in a public way, it will serve as a lightning rod for competing views and will be attacked and supported by various other persons within the

public, thereby permitting greater identification on the issue and reasons one should be for it or against it, and thereby facilitates robust debate on the issue of the day.

THE COURT: Let me ask you this: Let's assume if you are a candidate, you are going to want to run advertisements in the newspaper, the type of thing you are talking about independent expenditures might do, raising some, where this candidate stands on some issue. Now what difference does it make if you give—if you give the money by check to the candidate and then he takes out an ad in the Grand Rapids Press or whether you pretend you don't have any communication with him at all and you just go down to the Grand Rapids Press yourself and say, "I want to run this advertisement." Aren't they both apples or both oranges?

THE WITNESS: Absolutely not. Almost universally the candidates attempt to dissuade and discourage supporters from being involved in independent expenditures. They are uncontrolled. The campaign is—you attempt to orchestrate and control everything that occurs in terms of communicating with the public. When you have independent agents out there

* * *

[334] Q Mr. Epstein testified that the Chamber and other Michigan corporations are not hampered in any way, as he put it, from participating on an equal basis with other non-corporate entities in Michigan electoral processes under Section 54. Do you have an opinion as to whether or not that is accurate?

A Yes.

Q What is your opinion?

A It is not accurate.

Q Why not?

A The Chamber is banned from undertaking the simplest and most direct form of political communication with independent expenditures from their treasury funds.

Q I know that you touched upon this in some form before, but let me ask it again to be sure that any elements you wanted to discuss are touched on. Why do you believe that independent expenditures, which, as you just put it, are the simplest and most direct form, have little or no potential to be a corrupting influence in the electoral process?

A Well, I think to put my thumb on the strongest element of independent expenditures, is their visibility and disclosure, such that they are in the—it is not black bag, it is not under the table. This is out in the open such that the public can see who makes the expenditure and whether it was authorized or not authorized by a candidate. For example, should a major union or a major automaker undertake an independent [335] expenditue, if the statute treated them equally in terms of their ability to make an independent expenditure, the public is able to gauge that, who is the speaker, and when they are supporting a candidate, the citizens can decide, do I want to vote for a candidate who has—who is in line with General Motors or UAW in terms of this communication. So there is a natural disinfectant, if there is any corrupting influence on these independent expenditures, which I don't believe there is. In fact, they tend to facilitate a robust debate. Often candidates escape robust debate on the issues of the day and tend to avoid them. For example, in the hypothetical given this morning in terms of the Joel Boyden candidacy for Congress.

Q We are back to that.

A A candidate may try to avoid discussions on many of the social issues, abortion, prayer in schools, busing, because they try to avoid them because of the visceral reaction of the electorate and it becomes uncontrollable in terms of promoting a candidacy. Independent expenditures are free to speak on the issues of the day that, for example, the citizens of the State of Michigan or the American people, and to facilitate a bit of debate on those issues, and therefore they can have a helpful effect in an election encouraging debate on issues which both candidates, competing candidates will attempt to stay away from.

[336] Q If indeed independent expenditures are said to have a potential corrupting influence, is that corrupting influence more likely to come from corporations as from any other entity within the electoral process?

A No.

Q Mr. Mayberry, do you have an opinion as to whether or not corporations should have a role in the electoral process?

A Yes, I do.

Q What is your opinion?

A I believe corporations, as labor organizations, have a vital role in the policy development of our government in dealing with issues. The basic essence of our system and our freedom is realized on our capitalistic system in a healthful economy, and government has a profound effect on business and labor in their own interaction. Accordingly, the input from these two sources, business and labor in terms of developing public policy issues, especially those dealing with economic issues in which they have the keen and expertise to comment to the public, is of vital importance to a properly functioning government.

Q Okay. Let me switch gears just for a few moments. Upon voir dire as to your qualifications back on May 12th, maybe that is not the right date, whatever it was that we were last in session, Mr. Gartner, acting as the counsel for the defendant, suggested you had been involved in what he termed as

* * *

(Witness: E. James Barrett)
Barrett - Direct

[390] directors. I also am involved in various activities as a spokesperson for the State Chamber, and as a liaison with other organizations who share mutual interests.

Q When you say you are involved as a spokesperson what do you mean by that?

A As the president and chief executive officer, it is my responsibility to make public statements regarding the positions of the Michigan State Chamber and our membership to the media and the general public and in various forms throughout the state.

Q Okay. Admitted into evidence by stipulation are the bylaws of the Michigan State Chamber of Commerce and a listing of the Board of Directors of the Michigan State Chamber of Commerce for 1985-'86.

MR. BOYDEN: For the Court's reference, the bylaws are Exhibit No. 9 and the Board of Directors listing is Exhibit No. 10.

Q You may refer to any copies of those which you have with you, Mr. Barrett, in answering the following questions:

Would you please give the Court a general description of what it is that the Michigan State Chamber of Commerce is, describe the organization.

A The Michigan State Chamber of Commerce is a nonprofit organization made up of about 8,000 individuals and business entities. These are individuals in businesses that have [391] voluntarily joined together through their membership in the Michigan State Chamber. They share common beliefs and ideals. They join because they expect the Michigan State Chamber on their behalf to promote the common good and their interests for the business community. We are an ideological corporation advocating our private enterprise, such things as physical restraint in government operations, regulatory policies that are fair to the business community, and advocating the business point of view on regulatory and political issues that affect our membership.

Q With respect to the purposes of the State Chamber, would you indicate, please—I know that you have touched on some of those as you have answered my previous question—would you indicate, please, specifically what those purposes may be from the bylaws?

A Yes. Looking at our bylaws—and I'll just comment briefly on some of the key provisions of the objectives and purposes. A major one, of course, is to promote conditions that are favorable to economic development and enhancement and preservation of the private enterprise system; to provide information on laws and regulations that are of interest to our members, and of course make the members' views known to government; to provide training and education to our members through educational materials, seminars, conventions and so on; to promote ethical business practices and standards of conduct; [392] to collect data and provide information relative to social, civic, and economic importance to

the state; to receive expenditures and make contributions for political purposes; to be involved in the establishment, administration, and solicitation of contributions to our political action committee, and to cooperate with organizations who are formed for similar purposes and share those mutual interests.

That is a brief overview of our objectives and purposes as outlined in the bylaws.

Q Surely. Now, if you would, please, Mr. Barrett, with respect to the makeup of the Chamber, you have indicated about 8,000 members. Tell me, if you would, please, who it is that make up that membership, if you could give us kind of a cross-section?

A The membership of the Michigan State Chamber is very diverse. If we look at our membership from the standpoint of size of member firms using information that was available around the first part of April, we'll see that our members' breakdown by size with ten employees or less, a little over a thousand or roughly 15 percent of our members; about 57 percent of our members or around 4,500 members have 50 employees or less; about 80 percent of our membership or about 500, I believe, have 100 employees or less; and then approximately 20 percent or a little over 1,500 of our members have more than 100 employees.

[393] The other way of viewing the membership breakdown is often by the type of businesses that we represent.

Q Tell us a little bit something about that.

A It is very diverse, which is common with chambers of commerce. Manufacturing would be the largest, about 33 percent of our members. Retailing has about 12 percent. Financials and real estate, which would include

banks and savings institutions, make up about five percent. Construction firms, approximately 5 percent. Wholesale, about 14 percent. Services, about 17 percent. These are all based on standard industrial codes from Dun & Bradstreet, and it is a way to categorize business firms by classification.

Q Okay. With respect to governments of the Chamber, how is it that the Chamber is run? What is the governing body?

A The governing body of the Chamber is a Board of Directors that reflects the diversity of our membership. We are broken down throughout the state by eight geographical areas for purposes of electing directors—

Q Excuse me again, Mr. Barrett, if I could interrupt for a moment.

MR. BOYDEN: For the Court's benefit, this is really reflective of Exhibit 10 in our bench book of exhibits.

THE COURT: Thank you.

Q Go ahead. You mentioned you were broken down into regional groups of directors.

[394] A We also have at-large members, too. These people are elected by the membership and serve two-year terms, a maximum of three terms each if they're reelected.

Q Would you be able to indicate to the Court whether or not the diversity in your membership is similarly reflected in diversity in interests on the Board of Directors?

A I think that would be a fair statement, looking at both size and types of firms that are represented on our Board.

Q Tell the Court now, if you would, please, Mr. Barrett, how or what relationship there is between the State Chamber of Commerce and the local chapters or the local chambers of commerce that are throughout Michigan.

A In Michigan we have, of course, just one State Chamber of Commerce. We have roughly 250 local chambers of commerce. Each of them is a separate and independent organization with their own bylaws, their own board of directors, and they establish their own policies. So they are independent and separate entities by law.

There is a working relationship between the state and local chambers of commerce on many issues, legislative and regulatory being primary ones.

Q Incidentally, when did the State Chamber of Commerce come into being?

A The Michigan State Chamber of Commerce was formed in 1959, so as state chambers of commerce go, it is a relatively young [395] organization.

Q Is there an executive committee which has any part of the activities of the state—Michigan State Chamber of Commerce?

A Yes. The executive committee is made up of twelve individuals, eight regional vice-chairmans, chairman of the board, a treasurer, and an immediate past chairman, all of whom are business people, serve on a voluntary basis. The other member is myself as the president and chief executive officer.

Q In pursuance of the Chamber rationale for existence, that of an ideological organization, why does the Chamber conduct political activities?

A As I indicated from our bylaws, one of the basic purposes of the Michigan State Chamber is to be involved in representing the views of its members in the legislative and regulatory process, and we have done that from the inception of our organization in 1959. Later in the development of the Michigan State Chamber, it was felt that it was important to be involved in the political process, because those people that are elected through the political process ultimately are the ones that make the decisions relating to the regulatory and legislative process. Therefore our members from throughout the state felt that it was important that we become more involved in trying to help elect those people to public office who had an understanding of the importance of job development and who would have a good appreciation of the need to try to enhance [396] our business climate here in the State of Michigan through the policies they adopt.

Q In those areas where political activities are permitted under the Michigan legislation laws, how do the organizations of the Michigan State Chamber of Commerce decide on what activities it will undertake and what it will do in support of those activities?

A Are you talking about political activities, or are you talking about legislative activities?

Q Let's stick with political activities for the moment.

A The Michigan State Chamber of Commerce has set up a separate entity, political action committee that is involved in helping to elect people to public office who we think share our goals in job development for the State. There is an endorsement process for candidates for public office. In the case of incumbent legislators, decisions are made regarding their voting records and key business issues during the previous legislative session. If they obtain a certain level of support for many of the issues that are important to our

organization, then we automatically give them an endorsement, whether they be Republicans or Democrats.

In the case of non-economic legislators or people who are running for an open seat, we make an assessment based on an interview process and based on their response and attitude toward some of the key job development issues that our [397] membership is very interested in.

Q Who is it that actually make the decision to support or not support and the activities to be engaged in?

A As with other organizations that have political action committees, we have a PAC Board of Directors. It includes six individuals who ultimately have the responsibility for making the endorsement decisions, for making the decisions about the distributions of the voluntary contributions that are made by our members to our political action committee.

Q How are the board of directors of the political action committee of the Chamber related to the board of directors of the Chamber?

A There is no direct relationship, that is, the qualification for being a member of the PAC Board of Directors is not related in any way to the Board of Directors of the Michigan State Chamber of Commerce except that PAC board members must be members through their companies of the Michigan State Chamber of Commerce, and of course must be supportive of our political action efforts and have a keen interest in that area. The members of the PAC Board of Directors are appointed by the Chairman of the Board of Directors of the Michigan State Chamber.

Q Okay. Talk with us now a little bit about the legislative activities of the Chamber itself apart and distinct from the political action committee. How are those particular

activities decided upon and who carries them out, who and how [398] are they carried out?

A Again, like most organizations, we have committees of the Michigan State Chamber. They're made up of business people from member firms who volunteer their time and expertise on a broad range of issues covering everything from taxes to worker's compensation to environmental issues, energy issues and others. They develop policy recommendations to our board of directors. The directors meet on at least a quarterly basis and set the general policy guidelines for the membership and for the State Chamber. On the basis of those policy guidelines, volunteer members of committees, other members, directors and the staff of the Michigan State Chamber try to advocate those policies through the legislative and regulatory process.

Q Before we go too far down the track, Mr. Barrett, what kind of an entity is the Michigan State Chamber of Commerce from a legal standpoint, if you can tell us that?

A It is a nonprofit corporation established in the State of Michigan.

Q Okay. Are the political activities of the Chamber and of the Chamber Political Action Committee regulated by Michigan law?

A Yes, they are.

Q Are you familiar with Section 54 of Act 388?

A I am generally familiar with that legislation and that

* * *

[403] MR. GARTNER: Thank you.

BY MR. BOYDEN:

Q What is the effect of the curtailment of the Chamber and members of the Chamber of the right of free speech and advocacy under Section 54?

A It puts us at a disadvantage in presenting our point of view on behalf of our business constituency in the State of Michigan, and the end result of that is, in many cases, a perspective is not presented to help in the formulation of public policy and in the debate that goes into that process so that hopefully we will have better decisions made relating to regulatory activities in this state. We have lost a significant viewpoint from the job providers and the investors that fuel Michigan's economy.

Q What reasons are you aware of as existing which would justify the disparate and equitable treatment of the Chamber and other Chamber corporations, on the one hand, as opposed to the competing political and economic interests whose political participation in independent expenditures is unfettered?

MR. GARTNER: Objection, your Honor. That is calling for an opinion.

MR. BOYDEN: I am not asking for an opinion. I am asking for any reasons he knows of.

MR. GARTNER: Your Honor, Mr. Mayberry testified and gave his answers to those same questions as an expert. Mr. [404] Epstein gave his opinions. Mr. Barrett is a lay person, is not qualified to give his opinions, since he has not been qualified as an expert witness. He is a lay witness to testify about the Michigan State Chamber of Commerce. Whatever reasons there are for the treatment of corporations and

noncorporate entities in Michigan is a matter for expert testimony, which has been testified to and is not a matter nor within the expertise of Mr. Barrett.

MR. BOYDEN: The question, as framed, specifically said to Mr. Barrett, "What reasons are you aware of?" Now if he is aware of any, he will say. If he is not aware of any, that is what he will say. If he's aware of any, he will give some reasons. That isn't an expert question at all. It is a question that relates to his experience in the field as the chief executive officer of the State Chamber.

THE COURT: I will overrule the objection. I will take the answer.

BY MR. BOYDEN:

Q Do you want me to rephrase it?

A I don't know of any reasons, in answer to your question. You know, following the Attorney General's line of argument here, it seems to me that basically what is being said is that in the case of the Michigan State Chamber of Commerce, if we weren't a corporation, no one would be suggesting the government say, "No, we can't be involved in making independent [405] expenditures." Simply because we are a corporation, we aren't being allowed to be involved in that activity.

The argument is being presented or has been presented that through a political action committee we have a voice in the process. A political action committee involvement is greatly dependent upon the ability to raise, in the case of our organization and similar organizations, volunteer contributions from our members. If you are not a good fund raiser, then you are being precluded because of the prohibition on

independent expenditures in speaking out on many of the important public issues that need to be debated.

Q On June 10th of 19—

THE COURT: Excuse me. A thought just comes to mind. You think of a corporation as manufacturing mobile homes here in Michigan, and my broker talks me into investing $5,000 because it is a good investment and I want to make some money on it. Now Mr. Boyden is going to run for—we'll have him run for the State Senate. We'll move him up a little bit this afternoon. I may never have heard of him, with all due respect, don't know anything about his views. Is there any real reason you can think of why corporations should be spending my money that I'm anxious to be invested in the mobile home business to help elect Mr. Boyden to the State Senate? If the board of directors is interested in Mr. Boyden's views on economic issues and think he would make a good senator, is [406] there any reason why they can't, as a stockholder, send me a letter and ask me to make a contribution rather than spending corporate funds for that purpose? I just—you make the point here that the corporations are being treated so unfairly. Is the corporation really set up in our society for getting into the type of activities we are talking about?

THE WITNESS: If we look, your Honor, at the impact of regulatory and legislative policies on the ability of corporations to be profitable, to provide job opportunities, clearly there is an interest in having their direct involvement in the political and legislative process.

Using the mobile home industry as one example, I am sure there are many tax policies, worker's compensation policies, unemployment insurance policies, environmental regulatory policies that are set by our state legislature and those that

are elected to public office that could be the difference between the success of that mobile home company and industry and the failure of that industry. So it is absolutely essential that they have every right and opportunity to be involved in the process that they possibly can. And, in fact, through their involvement in many cases, a strong argument could be made that it is not only in the company's interest long term, it is in the shareholders' interest, in the employees' interest that they be involved.

BY MR. BOYDEN:

* * *

[416] Q "Alter ego" is another word that was used.

A I don't think that that is a fair characterization.

Q Why not?

A I think it is fair to say that there is some relationship between the Michigan State Chamber of Commerce and the State Chamber's PACs, that is obvious, because in order to contribute to the PAC, one has to be a member of a firm or be employed by a firm that is a member of the Michigan State Chamber of Commerce.

Again going back to a point that I attempted to make earlier, if we look at the number of member firms represented within the Chamber and the number of contributors to our political action committee; there is a significant difference in those numbers, and as a state chamber of commerce, we have an obligation to speak on behalf of our entire business membership through the auspices of the nonprofit corporate entity, the Michigan State Chamber of Commerce, and not just through the auspices of our political action committee which serves voluntary contributions, again from a relatively

small number of individuals in relationship to the number of member firms that we have.

Q With specific reference to the Michigan State Chamber, Mr. Barrett, under your leadership and with the direction and impetus provided by the Board, would you tell the Court whether or not the State Chamber has worked toward and achieved a [417] higher credibility rating than many other similarly situated organizations and advocacy groups?

A There is no question about public opinion polls have demonstrated that. Looking back to the Banstra campaign here in the Grand Rapids area, we saw from polling that was done, that the Michigan State Chamber of Commerce name had a high level of credibility, especially in relation to a lot of other organizations, including, for example, labor organizations.

We also know from other independent polls that have been done, one was reported not too long ago in the newspaper. It was a poll by the Democratic party where they asked, as I recall the article, a sample of voters from throughout the state what they viewed as the most credible organization in making decisions based on endorsements. And out of 30 organizations, the state and local chambers of commerce were number one. And there are other similar surveys that have been done.

So, relatively speaking, yes, the Michigan State Chamber has a high degree of credibility on public policy issues.

Q Contrast that credibility, if you would, with the credibility about which you may have any knowledge in conjunction with the Chamber Political Action Committee.

A Specifically regarding the State Chamber's political action committee, we don't have any survey data, but I think

[418] most everyone is aware of the type of PAC burning that has gone on in the media and by various interest groups who have been opposed to the involvement of businesses and corporations through political action committees.

So I think that you know there is a relatively high degree of criticism that is being put forth from various interest groups for political action committee programs at the present time.

Q Does that provide then a substantial explanation of why the Chamber and its members corporations is different, that it cannot accomplish its political goals and purposes through the Chamber Political Action Committee to the same degree it could as if it were allowed to make its own independent expenditures?

A We firmly believe that through independent political expenditures we could have a greater impact and it offers us another alternative for being involved in the debate or public policy issues, again an option that is granted to other entities that are involved in this process and the prohibition that is directed at organizations such as ours.

Q If the First Amendment freedoms that we claim are the rights of the Chamber are restored and it is allowed to make independent expenditures, how would the Chamber use that right?

A As I indicated in earlier answers, we would use it through such vehicles as the purchasing of advertising in newspapers, on radio and television, and we would try and communicate with

Barrett-Cross

[424] MORNING SESSION, FRIDAY, JUNE 13, 1986, 8:45 A.M.

THE COURT: Mr. Barrett, good morning.

THE WITNESS: Good morning.

MR. GARTNER: Good morning, your Honor.

THE COURT: Good morning. You may proceed.

MR. GARTNER: Thank you.

CROSS-EXAMINATION OF E. JAMES BARRETT

BY MR. GARTNER:

Q Mr. Barrett, you testified yesterday that the State Chamber consists of approximately 8,000 members; isn't that correct?

A Yes.

Q Isn't it true that more than 75 percent of your members are corporations?

A I would think that that would be a fair statement.

Q All right. And of those corporations that are members of the State Chamber, isn't it true that the majority of them are for profit corporations?

A Yes.

Q Now with respect to the approximately 25 percent, the remainder of your membership, isn't it a fact that those entities are noncorporate entities?

A In the earlier question, I believe you framed it to say at least 75 percent, and I would think that the figure would be higher than that are incorporated businesses. So I am a little [425] bit uneasy about using 25 percent as unincorporated, because I don't think that would be a fair statement of the actual makeup of our membership.

Q Of the remainder of your membership, isn't it true that they are nonincorporated entities?

A Yes.

Q And as a nonincorporated entity, isn't it true that they could make independent expenditures, which is the subject of this lawsuit?

A That is my understanding.

Q Isn't it also true that E. James Barrett as an individual could make independent expenditures, which is the subject of this lawsuit?

A I don't know that the subject of this lawsuit is whether E. James Barrett could make independent expenditures.

Q No, that is not my question. My question is as an individual.

A Yes.

Q All right. And isn't it true, for example, of Mr. Boyden, as an individual, as your understanding of the law, couldn't he also make independent expenditures?

A Yes.

Q Now you indicated you were the president of the State Chamber and also the treasurer of the State Chamber Political Action Committee; isn't that true?

[426] A Yes.

Q The PAC was formed in 1977?

A Yes.

Q Isn't it true that as the treasurer of the State Chamber Political Action Committee, you are the person required by law for keeping the records of the political action committee?

A I have that responsibility.

Q You are also, as the treasurer of the political action committee, the person that has to sign the campaign finance reports that are filed with the Secretary of State's office?

A I do sign them.

Q How many employees work for the State Chamber of Commerce?

A At the present time we have 34 employees working with the Michigan State Chamber.

Q All right. And isn't it true that some of these Chamber employees work on matters involving the State Chamber and also work on matters involving the State Chamber Political Action Committee?

A Yes.

Q All employees of the State Chamber are paid by the State Chamber; isn't that correct?

A Yes.

Q So there is no division of duties and functions, is there, between employees who work on State Chamber matters and who also work on State Chamber Political Action Committee matters?

[427] A Would you repeat that question, please.

Q Certainly. Perhaps I can rephrase it. Is there any division of duties of an employee who does work for the State Chamber and also does work for the State Chamber Political Action Committee? I mean, isn't it true that they are, in essence, combined into one?

A Let me try to answer your question in a fair manner.

As you have indicated, all the employees are on the State Chamber's payroll. We do have some that work in a for-profit capacity, too, for a subsidiary corporation, but that is unrelated to the political activity. We have some people who have responsibilities in the political area who also work in several other areas.

Does that address your question?

Q Yes. Thank you, Mr. Barrett.

Now you also testified yesterday that the State Chamber solicits contributions to its political action committee; isn't that true?

A Yes.

Q And based on your understanding of the Campaign Finance Law, Mr. Barrett, isn't it true that there is no restriction on the number of times that a—that the State Chamber can solicit contributions to its political action committee?

A Under the law I don't believe that there are any re-

strictions. There are some real considerations that have to [428] be given, though, as far as the number of times that you can solicit a member of the State Chamber and expect them to respond favorably.

Q But with your understanding of the law—and correct me if I am wrong, Mr. Barrett—there are no restrictions contained in the law as to the number or timing of solicitation of contributions to the State Chamber Political Action Committee?

A That's true.

Q Does the State Chamber expend its funds for the purpose of administering the State Chamber Political Action Committee?

A Yes, as provided by law.

Q And that is the same with respect to the cost of solicitation, the State Chamber uses its funds for the solicitation costs of soliciting contributions to its PAC?

A Yes.

Q And the establishment of a PAC, would that also be true that the State Chamber expended its funds in establishing the political action committee?

A Yes. Again, as provided by law.

Q For the current fiscal year, can you tell the Court how much money the State Chamber has expended for solicitations of contributions to its political action committee?

A No. As I indicated in my deposition, we don't maintain that kind of information.

Q Thank you. Can you tell the Court for the last fiscal [429] year completed by the State Chamber, how much money the State Chamber expended for the purpose of soliciting contributions to its PAC?

A No. Again, we offered that that information could be made available, and there was no request made for that information as a follow-up to our deposition.

Q That is not my question, Mr. Barrett. My question is can you tell the Court today how much money the State Chamber has expended for the purpose of soliciting contributions to its PAC for this year, for the last fiscal year or for any fiscal year; and your answer is no. Isn't that correct, yes or no?

A That is correct.

Q Thank you.

A There is no legal requirements —

THE COURT: Just a minute. If you will listen carefully to the question—I know that question and answer isn't the normal way that people normally converse. If somebody says something and you say yes or no but you think it needs further explanation, attempting to do that, but under the court procedures the attorney who's doing the cross-examination has a right to expect just an answer to that question. Now Mr. Boyden, if he thinks a further explanation is necessary in any of your answers, he will have a chance then to have you explain something further. So by the time you get off the stand, hopefully you are going to have a full opportunity to say what [430] you want to, but on cross-examination the examiner has a right to just a specific answer to the question he is asking.

THE WITNESS: Okay. This is my first appearance in court, so I appreciate the background.

THE COURT: Okay.

MR. GARTNER: Thank you, Judge.

Q Would your answer be the same, Mr. Barrett, with respect to administering the State Chamber Political Action Committee, that you are unable to tell us how much money the State Chamber has spent in the current fiscal year for the purpose of administering State Chamber Political Action Committee?

A Unable at this time.

Q Thank you. Would that be true of the last fiscal year?

A Yes.

Q And previous fiscal years back to 1977?

A Yes.

Q Can you tell the Court how much money the State Chamber expended for establishing the State Chamber Political Action Committee?

A Not the specific figures. It would have been minimal.

Q Thank you. Yesterday you also testified regarding the governing board regarding the State Chamber Political Action Committee. Correct me if I'm wrong. It consists of a six-person board of directors?

A Yes.

* * *

[434] there may have been subsequent opinions by the Attorney General. I must admit I wouldn't be qualified to speak on particular opinions.

Q But isn't it true that the PAC Board of Directors was established by the State Chamber?

A Yes.

Q Thank you. When the Complaint was filed in this case, Mr. Barrett, did you have an opportunity to review it at any time?

A I have reviewed it in the past.

Q All right. And in connection with the Complaint, isn't it true that you also filed an affidavit dated May 23, 1985? If you would like, I can show you a copy of it.

A I think I have a copy of it before me. The verification of complaint is what you are referring to?

Q It was an exhibit attached to the Complaint entitled "Affidavit of E. James Barrett."

A It might be helpful if I had a copy of that, if you think it is necessary.

Q Sure.

A Yes.

Q All right. Thank you. And in paragraph 2 of that affidavit, I believe, doesn't the affidavit recite that the State Chamber of Commerce is a Michigan nonprofit corporation?

A Yes.

Q Isn't it also true in paragraph 1 of the Complaint it [435] recites that plaintiff, Michigan State Chamber of Commerce, is a nonprofit corporation?

A Yes.

Q Isn't it also true, Mr. Barrett, in the articles of incorporation of the Michigan State Chamber of Commerce, that in Article 2 of the articles it provides several purposes for which the corporation was formed.

I will show you a copy of the articles of incorporation.

A Yes.

Q So isn't it true that the Michigan State Chamber of Commerce is a multi-purpose corporation?

A I am not sure I understand what is meant by "multi-purpose." If you are referring to the various purposes under Article 2, the answer is yes.

Q Thank you. May I have this back, please.

A Sure.

Q Yesterday you testified with regard to your understanding of Section 54 of the Michigan Campaign Finance Act, and isn't it true that the Michigan—that the law does not prevent the Michigan State Chamber of Commerce from expressing its views of issues to the public?

A That's true.

Q And that it only applies in the area of candidate endorsement and opposition?

* * *

[443] committees contributed or spent over $35,000 in the special State Senate election in Grand Rapids?

A I believe that is true.

Q Isn't it true that the State Chamber Political Action Committee is projecting having over $140,000 to spend in 1986 in the primary general elections?

A Yes.

Q Isn't it true, Mr. Barrett, that is 40 percent more than the State Chamber raised in 1984?

A Roughly.

Q The State Chamber PAC. Isn't it true, Mr. Barrett, that the Banstra ad that has been admitted into evidence—and I don't recall the exhibit number, which was originally attached to the plaintiff's Complaint, that that ad could have been sponsored by the State Chamber Political Action Committee?

A Yes.

Q Isn't it true that E. James Barrett could have paid for that ad out of his own funds?

A Yes.

Q Yesterday you discussed your participation and involvement in the legislative debates leading to the enactment of the 1976 Act enacting the Campaign Finance Law; isn't that correct?

A There was discussion about that.

Q Did you attend all the committee hearings that were held in the House of Representatives in the State Senate when Act

* * *

[446] Q You also talked yesterday regarding your views on the distinction with respect to corporate entities and media corporations, and you gave some testimony on that issue—do you recall that testimony?

A Yes.

Q Would you agree with me that the business of General Motors is to make cars?

A In part, that's true. As you are probably aware, General Motors is a much more diversified corporation today than they were a few years ago.

Q Wouldn't you agree that at least 50 percent of the business of General Motors is to produce automobiles?

A Yes.

Q Isn't it also true that one of the purposes of a bank is to make loans —

A Yes.

Q — to people that come in?

A Yes.

Q All right. Isn't it also true, Mr. Barrett, that one of the purposes of a newspaper is to editorialize?

A I never indicated otherwise, I don't believe.

Q Mr. Barrett, does the State Chamber of Commerce contribute corporate funds to ballot question committees?

A We have in the past.

Q Isn't it true that in 1984 the State Chamber contributed [447] $5,000 to a ballot question committee called "Citizens for Proposal A"?

A I believe that's true.

Q Isn't it true that the executive committee of the State Chamber passed a resolution that they would make a contribution of an additional $36,000 to the ballot question committee entitled "Citizens for Proposal A"?

A I don't recall the specific figures or action that was taken at that time.

Q Perhaps I can refresh your memory, Mr. Barrett. Excuse me. I keep losing things.

(Mr. Gartner handed a document to the witness and to the clerk for the Judge.)

Q Mr. Barrett, in order to clarify the record, I am showing you a copy of an affidavit signed by E. James Barrett in the case of Michigan State Chamber of Commerce versus Richard Austin, which is in the Eastern District of the State of Michigan before the Honorable John Feikens, file number 83W2263TD; is that a copy of the affidavit that you signed with respect to that case?

A Yes.

Q And my question is, did the executive committee of the board of directors of the State Chamber of Commerce resolve to contribute an additional $36,000 to the ballot question committee entitled "Citizens for Proposal A"?

* * *

[449] THE COURT: Do you think—is that incorrect?

MR. BOYDEN: I don't know.

MR. GARTNER: I was just responding to a question from the Court.

THE COURT: Well, he asked about the House, and that just naturally raised an interest as to what the Senate vote was.

MR. BOYDEN: I understand, and for the record I don't have any reason to doubt that is correct, but I am just not sure of the method of getting that before the Court.

THE COURT: All right.

BY MR. GARTNER:

Q Mr. Barrett, does the State Chamber of Commerce spend corporate funds for the purpose of lobbying members of the legislative and executive branch of state government?

A Yes.

Q Does the State Chamber of Commerce expend corporate funds for the purpose of communicating its views on political candidates to its members through reports, such as the executive report?

A Yes.

Q Does the State Chamber of Commerce expend corporate funds for the purpose of contributing to candidate officer holder expense accounts?

A On occasion.

* * *

(Witness: Robert S. LaBrant)
LaBrant - Direct

[474] — administrating the State Chamber Political Action Committee, I also lobby on behalf of the Michigan State Chamber of Commerce, primarily on issues that relate to the Campaign Finance Law, the election law, the lobby law, reapportionment issues, in that context.

Q In addition to the defined duties which you have in your position with the Chamber of Commerce, are you familiar with the general overall operation of the Chamber, at least to some degree?

A Yes, I am.

Q Okay. Would you give a description, please, of the nature of the Michigan State Chamber of Commerce.

A Well, the nature of the Michigan State Chamber of Commerce, first of all, it is a nonprofit corporation under the Michigan law. It's organized as a 501(c)(6) organization under the Internal Revenue Code. I think in a shorthand fashion the Michigan State Chamber of Commerce represents the interest of the business community in Michigan with state government, be it in the legislative halls, be it with the departments in the regulatory process, sometimes in court, and in the political arena on issues, ballot question issues, and also on the election of candidates to public office.

Q Do you believe it to be an ideological organization?

A I think the Michigan State Chamber of Commerce would fit the definition of an ideological corporation. We basically [475] promote the private enterprise system and believe in limited government, fiscal responsibility.

Q Now, Mr. LaBrant, you have been present during the entire course of this case, have you not?

A Yes, I have.

Q You've heard all the testimony?

A Yes, I have.

Q Okay. I will not ask you to repeat, in response to my questions, all of the detail that has been given by other witnesses. I'm perfectly content to have you do it in a shorthand or affirming fashion, if that is more comfortable for you and I think more economical for the interest of the Court and the parties, but I do want to touch on some of the things that have been raised and testified to by other witnesses.

Would you describe, please, the Chamber's involvement in the political and electoral process in the State of Michigan?

A Well, the State Chamber since 1977 has had a separate segregated fund, the State Chamber Political Action Committee. That committee is used to support candidates in their quest for nomination or election to public office.

In addition, the Michigan State Chamber of Commerce is involved and has been involved in statewide ballot question campaigns. On a frequency of almost every two years, we've been involved in some issue of concern for our membership.

* * *

[478] Q As you described your job duties and activities as an employee of the Chamber, you indicated that you are involved in the political action work and you were involved

in the lobbying work, would you indicate, please, the identity of the entity—the entities and interest groups that you most often find on the opposite side of issues that are being promoted in the electoral process by the Chamber?

A I think primarily when we deal with issues like worker's compensation or unemployment compensation, some environmental matters, that generally representatives from the AFL-CIO, the United Auto Workers, ASNE, some of those groups are probably our principal adversaries on legislative issues that we deal with at the State Capitol.

Q Would you please indicate, based on your knowledge of Section 54 and your experience, whether or not those particular entities are handicapped in any way in making independent expenditures from their organizations rather than from their political action committees?

A None of those three organizations that I mentioned are prohibited by Section 54 from using their treasury funds to make independent expenditures or, for that matter, direct contributions to candidates for public office.

Q Okay. You heard Mr. Barrett testify with respect to the purposes of the Michigan State Chamber of Commerce; is that correct?

[479] A Yes, I did.

Q Do you agree that those are purposes which you attempt to carry out through the political activities which are your responsibility?

A I believe that to be accurate.

Q Do you have any personal knowledge, based upon your experience and time and grade with the Chamber, of the variety of interests that are represented by the multiple

corporate interests, who are members of the Michigan State Chamber of Commerce?

A Well, an organization with 8,000 members probably by its size would have—would represent a multitude of interests, but we basically try to speak as a united voice for Michigan business. And as a result, included within our membership base are large corporations, small businesses—I think Mr. Barrett indicated that perhaps somewhere around 80 percent of our membership is firms of a hundred employees or less. The makeup of the State Chamber is such that it consists of manufacturers, retailers, agricultural firms, mining interests, local chambers of commerce, other trade and professional associations as well as some interested individuals.

Q So it is a wide and divergent group of interests and entities which make up the Chamber?

A That's correct.

Q Are you able, Mr. LaBrant, from the discharge of your [480] responsibilities and activities and your experience in carrying out those things, to testify as to whether or not the Chamber Political Action Committee is as effective a mechanism for the making of independent expenditures as would be the Chamber itself acting on its own?

A The political action committee, first of all, is limited in the size of its fund, basically by the amount of money that we can raise from individual voluntary contributions from a select group of individuals who fit within our membership base. And as a result, our speech, in the context of independent expenditures, if we go through the political action committee mechanism, is limited by our ability to be good fund raisers as far as the State Chamber PAC is concerned.

THE COURT: Let me ask you, though, isn't there something to be said for—you get involved in some sort of a controversial political issue—abortion, putting capital punishment on the ballot, things of that sort that people have some highly personal and emotional views on. Isn't there something to be said for seeking contributions from those people who are specifically interested in those issues; that is, if you're in the XYZ Corporation and you send out a memo to all your executives and shareholders, employees, make a pitch for this particular thing and urge that they make a contribution, isn't there something to be said—then you know that the money comes in, it is from people who really believe [481] in it, whereas if I'm a shareholder and I may or may not be interested in some of these issues.

THE WITNESS: Your Honor, when we're talking about political action committees, probably one of the purposes of a political action committee is to pool and accumulate modest sized contributions in advance. So generally when people contribute to the political action committee, it's in advance of an election and they generally, when they make the contribution, it's perhaps somewhat like a mutual fund in that they're hoping that those dollars will be put to good use. And so when the contribution is made to the political action committee, oftentimes this may be far in advance of the election. And so they—so one does not know who in fact the candidates are going to be probably in the time period that's spent in pooling or accumulating those dollars for the PAC.

THE COURT: Okay.

THE WITNESS: Now, your Honor, if I could just make one other point.

If in fact those contributors to the State Chamber Political

Action Committee or, for that matter, people who join the Michigan State Chamber of Commerce, if in fact they don't like what we do with their funds, be it with the political action committee or in fact the actual program activities of the Michigan State Chamber of Commerce, no one forces them to contribute the next year. They don't need to make another [482] contribution to the State Chamber Political Action Committee nor do they need to renew their membership in the Michigan State Chamber of Commerce.

So, in essence, they can kind of vote on those issues with their pocketbook or their fee and not participate any further if in fact they find those actions of the PAC or the actions of the State Chamber repugnant to their own personal philosophy.

THE COURT: Okay.

BY MR. BOYDEN:

Q And in fact, Mr. LaBrant, the actions undertaken by the Chamber or the Chamber Political Action Committee, in terms of the electoral process, are governed and limited to some degree by the purposes that have been enunciated in the bylaws; is that true?

A I think that is correct.

Q And in direct response to a couple of the issues that Judge Hillman raised in his hypothetical, the Chamber would not be involved in things like abortion or capital punishment, would they?

A I don't believe they would.

Q Is there a difference, as result of the limitation on independent expenditures by the Chamber, is there a difference in the nature and the quality and the amount, and therefore the results, of corporate advocacy when carried out through the [483] political action committee rather than through the corporation itself?

A I think that one of the problems, as I mentioned before, is that our ability to speak is limited by our ability to be good individual fund raisers. The other thing is that an advertisement, I suspect, that carried the disclaimer or the identification of the Michigan State Chamber of Commerce would probably be—perhaps have higher credibility than one carried by the State Chamber Political Action Committee. We don't have any quantifiable data on that, that's my opinion. My opinion is probably based upon the fact that political action committees, for probably since at least 1978 or 1980, have been under a period of public attack by such organizations as Common Cause. "Time Magazine" ran a cover story on political action committees called "PAC Men." CBS News ran a weekly series, basically done by Bill Moyers, on political action committees, rather highly critical of political action committees.

Now, whether in fact amongst the general public that an independent expenditure is addressed to, that the public would have a higher degree of credibility in an ad purchased by the Michigan State Chamber of Commerce, or one purchased by the State Chamber Political Action Committee, in my opinion, the one run by the Michigan State Chamber of Commerce would enjoy probably higher public credibility.

Q Okay. I would like to direct your attention now to the [484] fact that you indeed serve as counsel to the Chamber and ask you whether or not at a point in time in 1985 you concluded, from developments of the law, that the Chamber should investigate the enforcement of its First and Fourteenth Amendment rights with respect to independent expenditures?

A I believe we, in about April of 1985, we began to investigate the opportunity of launching this particular lawsuit.

Q Why?

A We saw—first of all, in March of 1985 the United States Supreme Court issued its decision in FEC versus NCPAC, National Conservative Political Action Committee,-which basically held—which basically dealt with the issue of independent expenditures. And in that particular case the court restated its position from Buckley that independent expenditures were entitled to a higher constitutional protection than that of contributions, and that in fact, as far as independent expenditures was concerned, the court could find no compelling state interest to restrict independent expenditures as they could find with contributions, because there was not the same potential for a financial quid pro quo, since there was no coordination with the candidate. Now, given that fact of the NCPAC decision, we saw a window of opportunity available to us, so to speak, to redress an ancient wrong. There was a special election occurring in the Grand Rapids area in the 93rd House [485] District on June 10th. We felt that if we instituted this particular lawsuit in that time span, we might have an opportunity to get a judicial ruling on this particular case in time for participation in the 1986 election.

Q As a result, were steps undertaken to go forward and investigate the possibility of placing an ad in the Grand Rapids Press as an independent expenditure of the State Chamber of Commerce?

A Yes, they were.

Q What cooperation or coordination of efforts were involved with the Chamber and Representative Banstra or any

of his campaign organizations or anybody else that would make that a coordinated effort?

A Absolutely none.

Q Would the ad then have been a truly independent expenditure?

A Yes, it would have.

Q Why was the Chamber ultimately restrained from publishing that ad?

A Because this Court did not grant injunctive relief, and we didn't want to pursue the placement and payment for that ad because of Mr. Gartner's ability to come and prosecute us for the placement of that ad.

Q And you were not willing, even to right an ancient wrong, to go to jail for that?

[486] A Perhaps I would have, but President Barrett was not.

(Laughter)

Q (Laughter) Okay. What distinguishing characteristics do you know about which would justify the differential treatment which Section 54 commands respecting corporations, on the one hand, as opposed to other unincorporated associations and labor unions and the like on the other?

A As they relate to independent expenditures?

Q As they relate to independent expenditures. Thank you for clarifying that.

A I—I know of none, because it seems in my opinion that independent expenditures is an area of pure speech.

Q How about the distinctions which Section 54 draw between media corporations and corporations with respect to independent expenditures, do you know of any distinctions which would justify the infringement of the constitutional freedoms on the part of corporations?

A I'm not aware of any.

Q In fact, do the independent expenditures for advocacy, which media-related corporations undertake, have in your experience a potential for a significantly higher impact than independent expenditures, if allowed, by corporations?

A I think studies show that basically editorials enjoy higher public credibility than paid advertisements.

THE COURT: I can't resist on that note that I was

* * *

LaBrant-Cross

[495] membership of the State Chamber?

A Section 55 of the Michigan Campaign Finance Laws sets out in some detail who we can solicit. Primarily it is individuals who join the State Chamber as individuals or those shareholders or managerial employees of member corporations whose corporation is a member of the Michigan State Chamber of Commerce.

Q All right. What is the pool, though, of individuals that are eligible for making contributions to the State Chamber PAC?

A That is a number that, frankly, I am unaware of how large it would be.

Q Fifty thousand, perhaps?

A I suspect that that would be—that would probably be—I don't know. It might be—it certainly would not be less, if we are talking about shareholders.

Q Isn't it true, Mr. LaBrant, that one of the functions of the State Chamber, in fact, one of your responsibilities, is to assist other organizations that want to start a political action committee?

A That's correct.

Q And that that hasn't been a major priority of the State Chamber to organize political action committees within corporations, trade and professional associations, and local chambers of commerce?

A It has been a priority. It's been a higher priority, [496] perhaps, in the period of time directly after the effective date of this Act in 1977 and 1978 when this was a brand new concept.

Q All right. Isn't it true that in 1976, prior to the enactment of the Campaign Finance Law, that there were less than 30 business and professional political action committees in Michigan?

A That's what records indicate.

Q All right. And that in 1978, isn't it correct that that number grew to 143?

A That's correct.

Q And in 1980 that number grew to 177?

A That's correct.

Q And isn't it true that today there are more than 200 political action committees sponsored by corporations, trade and professional associations and local chambers of commerce?

A That's correct.

Q Well, isn't it true, Mr. LaBrant, that these efforts of the State Chamber have been successful in forming and organizing political action committees that are sponsored by the business sector in Michigan?

A I believe that's correct.

Q Isn't it true that in 1980 the State Chamber persuaded the Grand Rapids Area Chamber to form a political action committee?

A That's correct.

[497] Q In your role as vice-president of the State Chamber, hasn't the Chamber published a document entitled "Mini PAC Kit for Chambers of Commerce, Trade Associations and Small Businesses"?

A That's correct.

Q All right. And could you describe for the Court what is these—what are these Mini PAC Kits?

A The kit was developed basically to serve a need of how one would go about establishing a separate segregated fund under the Michigan Campaign Finance Law. And so what we tried to do was to put in a guide book the steps and procedures necessary to follow and the paperwork necessary to be filled out in establishing a political action committee under the Michigan Campaign Finance Law.

Q All right. So, isn't it true, that it's in essence a step-by-step manual for establishing, organizing and operating a political action committee in Michigan?

A That's correct.

Q All right. And in the Mini PAC, doesn't it include sample solicitation letters?

A That's correct.

Q Sample board of directors' resolutions adopting proposed bylaws for political action committee?

A That's correct.

Q Sample statement of organizations that have to—a sample [498] statement of organization form that has to be filed with the Michigan Department of State?

A That's correct.

—

Q In essence, then, it's everything you wanted to know about forming and organizing a PAC is contained in the Mini PAC kits that have been prepared by the State Chamber; isn't that an accurate statement?

A Everything you—we needed to know? Perhaps not, but —

Q But it's a thorough step-by-step manual for establishing —

A That's correct.

Q — and operating a political action committee. Does it also include sample payroll deduction authorizations?

A Correct.

Q And also includes sample forms that have to be filed with the Secretary of State, including organization forms?

A That's correct.

Q Reporting forms? In fact, isn't it true that the Mini PAC kit includes form that have already been filled out in order—sample forms to assist people who are putting together a political action committee?

A They demonstrate how the form should be filled out.

Q Isn't it true that in October 1981 the State Chamber sponsored a statewide conference on chamber political action?

A Yes, we did.

Q And that was held in Lansing?

[499] A That's correct.

Q What was the purpose of that conference?

A To encourage local chambers of commerce to organize political action committees.

Q All right. And in fact after the conference isn't it true that State Chamber's staff spoke at local chamber board meetings across the state encouraging them to form political action committees?

A That's correct.

Q And that has also been successful, hasn't it?

A Yes.

Q Isn't it true that in June of '84 the State Chamber sponsored a chamber PAC campaign management institute?

A That's correct.

Q And what was the purpose of the institute?

A To invite in candidates who were running for state and local office to attend the campaign management seminar on ways to get elected to public office.

Q All right. And didn't the State Chamber form the Political Action Committee Exchange Council?

A Yes, we did.

Q And what is that?

A It is a forum for PAC managers to meet periodically to share information, ideas and techniques on the administration and operation of a political action committee.

[500] Q And is this council mainly composed of representatives from the business community?

A That's correct.

Q Isn't it true that in fact even prior to 1981 the State Chamber sponsored and ran PAC regional workshops and conferences in various spots in the state?

A We did that in particular in 1977 and in 1978.

Q What was the purpose of those conferences?

A To encourage corporations and trade and professional associations to establish political action committees.

Q Isn't it true that the Michigan State Chamber PAC is the largest state chamber PAC in the United States among those states that prohibit direct corporate contributions to state candidates?

A That is correct.

Q Isn't it true that the State Chamber PAC set a record in 1974 raising more than $102,000 during the 1983-1984 election cycle?

A That is correct.

Q Isn't it true that in November of 1984 the State Chamber PAC endorsed 67 House candidates, 64 of such candidates won election for a 96-percent win ratio?

A I believe that is correct.

Q Isn't it true that in the August 1984 primary election the State Chamber PAC was financially involved in 18 primary [501] contests, and in 15 of these races the State Chamber-endorsed candidate was successful?

A I believe that is correct.

Q Isn't it true that in the two special Senate elections held in the spring of 1984, after the recall of Senators Mastin and Serotkin, that the two State Chamber PAC candidates were successful?

A That's correct.

Q Isn't it true that in the November 1984 general election the State Chamber Political Action Committee contributed more than $22,000 to three endorsed candidates from Michigan to the Supreme Court, two of which were victorious?

A That's correct.

Q Isn't it true that in the June 1985 special election for the Banstra seat, that the State Chamber-endorsed candidate was successful?

A That's correct.

Q Isn't it true that in November 1980 the State Chamber PAC endorsed 66 State House candidates, and 66—excuse me, 63 of them were victorious for an 87 percent win ratio?

A I don't know, but I suspect that figure is correct.

Q All right. Isn't it true that in July of 1985 the State Chamber PAC released nine computers, printers and software packages and loaned them to nine legislators?

A And we—we went through that process and provided them [502] as in-kind contributions.

Q And how many —

A Nine.

Q Nine legislators. Does the State Chamber of Commerce expend corporate funds for the purpose of communicating to the public its views on legislative issues?

A Yes, we do.

Q And I show you, Mr. LaBrant, a copy of proposed Defendants' Exhibit No. 11. Would you please identify that?

A This is an advertisement that was placed in the Tuscola County Advertiser.

Q And who paid for that ad?

A The Michigan State Chamber of Commerce.

Q And could you just briefly paraphrase the contents of that ad and describe for the Court the purpose of it.

A This ad was placed in the context of legislative debate

over the issue of a vote that occurred in the State House of Representatives on a resolution calling for a federal balanced budget resolution. The Michigan State Chamber of Commerce was part of a coalition of organizations that was actively lobbying to have the resolution passed. In the process of trying to obtain legislative passage of that resolution we conducted a very active grassroots lobbying campaign identifying supporters in key legislative districts, communicating with those individuals who had indicated support of this resolution, and [503] encouraging them to contact their legislators to make their views known on this particular issue. In floor debate Representative Dick Allen spoke out against our lobbying tactics and basically said that he felt that all of these phone calls that were placed to constituents were abusive, and so—and following that particular legislative floor debate, we placed an ad in the Tuscola County Advertiser informing the constituents of Representative Dick Allen as to his comments and to his vote on that particular resolution.

Q And that ad was paid for by the Michigan State Chamber of Commerce?

A That's correct.

MR. GARTNER: Your Honor, I would move the admission of Defendants' Exhibit No. 11.

MR. BOYDEN: Is that an ad which was previously identified in conjunction with the pretrial order?

MR. GARTNER: No, it was identified last month when we came to trial on the first day.

MR. BOYDEN: When we met, and marked at that time and presented to us?

MR. GARTNER: I believe so.

MR. BOYDEN: Exhibit 11—if I could take a minute, your Honor, I will check the record on it.

THE COURT: All right.

MR. PERRONE: That exhibit was shown to us and I [504] believe marked Defendants' Exhibit 11.

MR. BOYDEN: Okay. Then we would not object, your Honor.

THE COURT: All right. It is received.

MR. GARTNER: Thank you.

(Defendants' Exhibit 11 was offered and received.)

BY MR. GARTNER:

Q Did the Michigan State Chamber of Commerce pay for similar ads in other newspapers across the state at this time?

A I believe that this was the only ad paid for by the Michigan State Chamber of Commerce in this context.

Q All right. Would you agree with me, Mr. LaBrant, that this ad is an example where the State Chamber is communicating its views to the public with respect to public issues?

A Yes, I would agree.

Q All right. Are you aware of a recent poll that was commissioned by the Michigan State Chamber of Commerce?

A I'm aware of the polls that are commissioned by the Michigan State Chamber of Commerce.

Q I'm referring to a poll that dealt with the issue of public financing and political action committees.

A Yes.

Q All right. And was that a poll commissioned by the State Chamber of Commerce?

A That's correct.

[505] Q And isn't it true that that poll found 52 percent of the public aware of the view that political action committees should be allowed to contribute financially to political candidates?

A That's correct.

Q You also testified earlier, Mr. LaBrant, that the Banstra ad that was attached to the original Complaint filed in this case, and has been marked as an exhibit by plaintiff, that that ad did not run in the Grand Rapids Press; isn't that correct?

A That's correct.

Q And—but it's true that the Chamber PAC could have run that ad; isn't that correct?

A That's my understanding.

Q All right. Why didn't the Chamber run that ad, the Chamber PAC run that ad?

A We made the decision just not to run it.

Q All right. Isn't it true that one of the reasons for your

decision was that it wasn't necessary that your polls indicated that Mr. Banstra was going to be the victor?

A That was part of our decision-making process.

Q Okay. Mr. LaBrant, I'm showing you two exhibits that have already been accepted into evidence, PAC directories from 1979, 1984. Just for the record, could you describe what they are and how the information is compiled?

A Mr. Gartner, the first document that I have here before me [506] is the document entitled "Directory of Business and Professional State Level Political Action Committees in Michigan" that was compiled by the Political Action Division of the Michigan State Chamber of Commerce April 1, 1979. This directory was compiled by myself by going through Department of State records, statement of organizations that were filed with the Campaign Finance reporting office of the Department of State.

The other document I have here is a 1984 Michigan PAC directory, basically which is an update of the 1979 PAC directory, and basically periodically updated every year or every two years.

Q Are these documents or the most recent document, are those available to members of the State Chamber of Commerce?

A They're available to anyone.

Q And have you given copies of the '84 document to people that have requested it?

A Hundreds.

Q Hundreds? Did the State Chamber of Commerce

contribute money towards the reapportionment lawsuit that was brought in Oakland County of 1984?

A Yes, we did.

Q All right. Does the State Chamber expend corporate funds for the purpose of lobbying?

A Yes, we do.

[507] Q Does the State Chamber expend corporate funds for the purpose of making contributions to ballot question committees?

A Yes, we do.

Q With respect to your testimony on direct exam you—and correct me if I'm wrong, but you gave certain testimony regarding the position of the State Chamber and how it's affected by the independent expenditure ban contained in Section 54 of the Campaign Finance Law. Do you recall that testimony?

A Yes, I do.

Q Isn't it true that within the last one or two sessions of the legislature, that worker's compensation reform was enacted?

A Worker's compensation reform was enacted in December of 1981.

Q All right. And isn't it true that within the last, let's say few sessions of the legislature, unemployment compensation reform was enacted?

A I believe it has.

THE COURT: Let me just interrupt for a moment, be-

cause I was still looking at the exhibit that you said that you put together, this directory.

THE WITNESS: Yes.

THE COURT: You show a list of the PACs, total business and professional PACs, you show roughly a three-million six figure. Then you have listed separately the '81 —

* * *

[510] THE COURT: Fine. All right.

BY MR. GARTNER:

Q Mr. Barrett (sic), isn't it true that at the annual meeting of the United States Chamber of Commerce that was held in, I believe, 1985, the Michigan Chamber PAC network was spotlighted as one of four program models that state and local chambers ought to implement?

A You're addressing me, and yes, the answer is yes. You called me Mr. Barrett, that's —

Q Oh, I'm sorry. Thank you. I do know the difference.

All right. And isn't it also true that in a speech that you gave to the Greater Detroit Chamber of Commerce in January of 1970—1986 you said that the fifty chamber PACs in Michigan in 1982-'83 were more than had been established in the rest of the United States combined?

A That's correct.

MR. GARTNER: That would conclude my questions, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION OF DONALD JOSEPH LABRANT

BY MR. BOYDEN:

Q Mr. LaBrant, you don't deny for a moment that the activities of the Chamber Political Action Committee under your leadership have been successful, do you?

A Not at all.

* * *

(Witness: Webster Buell)
Buell - Direct

[517] Q Now, pursuant to your function as liaison with the department of Attorney General, were you requested last year to compile some campaign finance data?

A Yes, I was.

Q All right. And can you tell the Court what you did and how you went about it in compiling certain data. And before we get there, let me show you proposed Defendants' Exhibits 4-A and 4-B, and then could you please answer my question.

A Okay. These—the exhibits are printouts that resulted from our work in compiling data under the Campaign Finance Act. The printouts are dated January 30th, 1986, and they have reference numbers of CF0030 and CF0040. The—we began to put together the data that we could utilize in these printouts back in late summer or early fall of 1985. Up until that time the department had no systematic compilation of data showing receipts and expenditures by independent and political committees over the four general election cycles that had taken place since the Acts went into effect.

We did, however, have a list of all the independent political committees by their identification number, and we also had data that had been compiled in each election cycle indicating receipts and expenditures. We devised a program and method for taking that data and matching it with the data that we already had for—on names and identification numbers of committees.

[518] We also attempted to categorize committees on the various categories shown on the printout.

Q How did you do that?

A We set up the categories based on some work that had been done by a former employee of the department. He had prepared an index of independent political committees and put them in categories, four major categories and subcategories under those major categories. The four major categories being business, issue-oriented, party-related, professional—and I guess there were really five or six categories. He also had labor and miscellaneous.

Q What is the difference between computer run CF0030 and computer run CF0040?

A The printout 0030 shows them by these categories that I've just described, shows the committees grouped in those categories. So under business you would have business, subcategory of agriculture, auto dealers, auto manufacturers, real estate, and so on.

Q And you selected the names that fell under each category?

A I relied on that previous work I just described, but I basically decided to use these categories. I also made some modifications where I knew that committees had been miscategorized, or I believed them to be miscategorized.

Q Looking at the computer run, I believe, which is Exhibit—proposed Exhibit 4-A. At the top, Cattlemen's Political Action [519] Committee, and looking at 1984, there are figures for receipts and expenses.

A Yes.

Q Can you tell the Court what are receipts, what are expenses, and where these numbers came from?

A The numbers on the printout come from a secondary report that had been generated within the department by personnel at the elections division. They showed this in a statistical report that they did on the 1984 election. That, in turn, has been taken directly from the reports of the various committees.

The receipts represents money coming into the committee, the monies the committee received from whatever sources they rely on.

The expenses is a figure representing the money going out of the committee during that period of time.

Q All right. And can you briefly describe to the Court the process that actually led to the production of these two computer runs.

A Well, the process was a fairly cumbersome one because our department doesn't have much personal computer processing capacity so we have to rely, if we want to do it electronically, rely on a mainframe computer, which requires substantially programming, which is why it took us some time to devise this. But, as we programmed it and put this data together, and put it in the various categories, we generated the [520] printouts and subsequently made corrections where we found that there had been mistakes in putting them in.

Q Now with respect to computer run 0040, can you describe how you identify the corporate committees?

A Yes. The Michigan law does not require separate segregated funds of corporations to indicate that they are affiliated with a corporation, so we had to go to other sources. The first source that we utilized was the PAC directory for 1984 put out by the Chamber of Commerce which lists affiliated committees and the corporations that they are affiliated with or organizations.

Q What did you do after that?

A We then found that that did not categorize a substantial portion of the committees, and so we mailed out a letter and postcard to all the active committees that were currently registered at that time. And the letter—it was actually a memorandum signed by Secretary of State Austin asking the committees to return the card and indicate on the card whether they were a separate segregated fund affiliated with a corporation or whether they were not.

We affixed to each of the cards a mailing label from the committee so that we could subsequently identify which committees we were talking about. We sent out approximately 800 of these cards. We got a return, a substantial return on the cards. And then we also went and telephoned committees that [521] had not returned cards in an effort to have them send the cards in or tell us by telephone whether they are a separate segregated fund or not. The total result was that 625 or -6 that, estimated, a number of committees responded to these requests, either by card or by telephone.

Q And what did you do about the committees that didn't respond either by mail or by phone?

A The committees that we had identified from the Chamber PAC directory that did not answer, that we had identified as corporate committees, we left as corporate committees. Any other committees we categorized as noncorporate.

Q Mr. Buell, have you done a sample of the data contained in the proposed Exhibits 4 and A to determine its accuracy?

A Yes, we did.

Q And what did you do and what were the results?

A Well, we sampled from the data for 1980, 1982, and 1984, after checking with a statistician who works on occasion for the department, he advised us that an adequate sample for these purposes would be 49 instances of receipts and expenditures, 49 or 50. We actually drew—we were trying for 50, but somehow we only drew 49. Out of the 49 sampled, we found that the number appearing on the printout was accurate in 44 of the 49 cases —

Q What is that percentage?

A — for expenditures. It's about 90 percent, 89.7, I [522] believe. For receipts, 43 out of 49 were accurate. The—and the sample was done not from the intermediate reports that we had relied upon to prepare the printout.

Q You went back to the original data?

A Yes. We had analysts go back to the original reports to determine what numbers appeared there. The reason that we did not use 1978 data is that the Campaign Finance Law requires us to destroy all reports and microfilm of reports after a five-year period. So that data is unavailable, from us anyway.

Q So in that case, for '78 then, what did you rely on?

A From '78, we did not sample the '78 data.

Q But what did you rely on in compiling the data on the two computer runs?

A The intermediate reports that the department handled.

Q All right. Do these two computer runs contain committees that are commonly referred to as unified committees

A Yes. There are a number of committees that are on this printout who not only are registered with the State of Michigan with the Secretary of State's office, but are also registered with the Federal Election Commission, and in some cases there are monies that were contributed to federal candidates appearing in the figures that are on our printout.

Q All right. Why was—why were those unified committees included in the computer printout?

A Well, they are independent political committees that are [523] registered here in Michigan. In fact, in some cases they are quite substantial.

Q And what is—what is proposed Exhibits 4-A and 4-B, what are they supposed to show?

A These show receipts and expenditures for the elections in 1984, 1982, 1980, and for the total election cycle in 1978. The reason I put it that way is that for the '80, '82, and '84 periods, we do not have data for special elections that occurred during those years.

Q Isn't it true, though, that you put that data in another document?

A Yes. We subsequently compiled special election data.

Q All right.

MR. GARTNER: Your Honor, I would move the admission of proposed Exhibits 4-A and 4-B.

(Defendants' Exhibits 4-A and 4-B were offered.)

THE COURT: Which is 4-A and which is 4-B?

THE WITNESS: The way to identify it is look at the very top.

THE COURT: One has corporate and one has business?

THE WITNESS: Yes. The one that starts out business is the 4-A.

THE COURT: That's 4-A. And the one that says corporate is 4-B?

Buell-Voir Dire

[524] THE WITNESS: Correct.

THE COURT: All right.

MR. PERRONE: Your Honor, I think it's my turn to give Mr. Boyden a rest and examine the witness, if I may, on voir dire on these two exhibits.

THE COURT: Fine.

VOIR DIRE EXAMINATION OF WEBSTER BUELL—

BY MR. PERRONE:

Q Mr. Buell, you indicated that these reports were taken—were compiled from secondary reports; is that right?

A Yes.

Q They were not constructed from the primary document?

A No.

Q You indicated that some sampling was performed. Was that sampling done since your deposition taken on April 16th where you told me no sampling was done?

A Yes.

Q You indicated that there was an error right in the sampling. In the case of expenses, 5 out of 49 were in error, and in the case of receipts, 6 out of 49 were in error; is that right?

A There was a— I don't know if you're looking at the same document that I'm looking at, but there was a—the report we had from the statistician, he assumes that there were 45 out of 49 were error-free in the expenditure side. That was the

* * *

[531] which, of course, then leads to who the sponsoring corporation or unincorporated enemy is, so the Court can have a look at what the level of spendings have been in this State.

One of our claims in this case Your Honor, is that the Plaintiff Chamber of Commerce First Amendment rights are

not even impaired by this statute. And that has been demonstrated through the activities of the State Chamber that have been explored on cross-examining witnesses of the State Chamber. And, likewise, we are attempting to show not only the activities of the State Chamber, but various other corporations in the State of Michigan.

THE COURT: Well, I would agree with plaintiff's counsel. This is not a PAC case, as such, but certainly the testimony, and I think the determination by this Court of the specific requests by plaintiff in his amended Complaint deal with independent expenditures. It can't be looked at without an overall view of the overall role of the corporations and PACs, and consequently the Court will receive Exhibits 4-A and 4-B.

(Defendants' Exhibits 4-A and 4-B were offered and received.)

THE COURT: I might also note that Mr. Mayberry's computations that the Court received, as I recall, were broader than just independent expenditures. So at least this is consistent with that earlier ruling.

* * *

[536] Q All right. Were you in the courtroom, Mr. Buell, when Mr. Mayberry made the statement that to the—to his knowledge there was only one incorporated union in the State of Michigan?

A I guess I was.

Q All right. And during the adjournment was a request made to you to search the records of the Corporations and Securities Bureau to determine whether the statement of Mr. Mayberry was true?

A That's correct.

Q Did you conduct such a search?

A Yes.

Q And what did you find?

A Well, we found, in looking through microfiche from the incorporation division, that there were a number of entities which appeared to be labor unions that were incorporated as nonprofit corporations.

Q All right. Mr. Buell, I show you proposed Exhibits 14 through 36, and can you just very briefly describe what they are.

A These are certified copies of articles of incorporation that are in the files of the Michigan corporation division for the organizations that were identified, and they indicate what—who the organization is and what it is.

Q All right. So isn't it true that these are 23 articles of incorporation of incorporated labor organizations in the State [537] of Michigan?

MR. PERRONE: I am going to object to the question, your Honor. I don't think there has been any foundation as to what a labor organization is and how it was determined that these were labor organizations for which the articles were searched and retrieved.

THE COURT: Well, perhaps you could lay a foundation for that.

MR. GARTNER: All right.

Q Mr. Buell, how did you determine whether an entity was a labor organization?

A Well, my understanding is that a labor organization is an organization that represents employees of a business or government agency who ban together to engage in collective bargaining with the employer to effectuate a contract regulating wages, hours and working conditions.

Q Did you review the purpose clause on all these corporations?

A I looked at them, yes.

Q And is it your determination that these proposed exhibits consist of labor organizations that have been incorporated in the State of Michigan?

A These organizations, yes, appear to be labor organizations.

Q All right.

[538] MR. GARTNER: I would move the admission of proposed Exhibits 14 through 37, I believe—36.

THE COURT: They'll be received.

MR. BOYDEN: Your Honor, don't we have a chance to give the Court a position with respect to these?

THE COURT: I didn't see any signs of any objection. That was the only —

MR. BOYDEN: Mr. Perrone was on his feet, your Honor.

THE COURT: I'm sorry. It is just getting late in the morning and —

MR. BOYDEN: I understand that.

THE COURT: — I'm not at any time not give you a full opportunity to make any objection you wish.

MR. PERRONE: I have one or two voir dire questions before I make my objection, your Honor.

THE COURT: Fine. Go right ahead.

VOIR DIRE EXAMINATION OF WEBSTER BUELL

BY MR. PERRONE:

Q Mr. Buell, do you any personal knowledge with respect to the organizational nature or operations of any of these 23 corporations?

A Personal knowledge?

Q Yes.

A No.

Q Did you contact any of these organizations and ask them [539] what kind of activities they actually engage in?

A No, I did not.

MR. PERRONE: Your Honor, I would, on behalf of the plaintiff, object to the entry of these 23 rather lengthy documents and clutter up our record here today for a number of reasons. One is the same reason that the Court used to deny the rebuttal documents we attempted to put in during the plaintiff's Exhibits 15 and 16, and that is, these haven't been previously marked. We were unaware of them until yesterday when they were brought in. They are lengthy documents.

Secondly, the information is certainly hearsay. We have no ability to cross-examine as to what these organizations—what they really are and what they really do. We have an individual who has gone and looked at the purpose clauses in a number of filings with the corporations and securities bureau and determined that they are probably labor organizations. And we've spent an awful lot of time in this case with witnesses defining the organizational status and nature and operations and activities of the Michigan State Chamber of Commerce to satisfy the Court that it is a nonprofit membership organization trade association and detailing what kind of political involvement they had and what kind of education involvement and the membership they had, what other activities they were involved in.

We don't have any of this information with respect to [540] these organizations. We don't even have a workable definition of what a labor organization is unless Mr. Buell has been qualified as an expert in labor law. And for those reasons, in addition to not cluttering up the record, we would object to the entry of these 23 exhibits.

MR. GARTNER: Your Honor, these exhibits are rebuttal exhibits, which is totally consistent with this Court's pretrial order that rebuttal evidence need not be provided in advance. These records are certified and admissible on their own under the federal court rules, and we can argue in our briefs as to whether these are labor organizations or not, but these documents are admissible on their own, and we're asking the Court to receive these documents.

MR. PERRONE: That was our argument with respect to the certified copies of Plaintiff's Exhibits 15 and 16 from the federal archives office, your Honor, as rebuttal exhibits.

THE COURT: Let me see what those exhibits were.

MR. GARTNER: Those were the stipulated —

MR. BOYDEN: Facts from the —

MR. GARTNER: — facts from the two cases arising out of litigation in 1978.

THE COURT: Well, first of all, as I recall, with Exhibits 15 and 16, they were in fact stipulations in a particular lawsuit that was filed in the Southern District of New York, and, although I may have mentioned at the time that [541] they may have been untimely, it's my recollection that the principal concern the Court had was the effect of a stipulation in a court that—in a case in which the Court had no knowledge or background of the stipulation. In my own experience of stipulations in particular lawsuits, they may be done for—to save time or they may not have any particular value in that lawsuit and therefore they would be willing to stipulate in that lawsuit but would not expect that they would be—somehow be stipulated as—or to be used in other cases.

As I look at these Exhibits 14 through 37, although I agree that they may kind of clutter up the record, just taking a quick look, it's the Lincoln Park Police Officers Association, the Warren Police Officers Association, the Wyandott Fire Fighters Fraternal Organization, Birmingham Police Officers Association, Royal Oak Police Officers Association, MEA, Michigan State Employees Association, Local 429 of the International Allied Industrial Workers of America, the Police Officers Association of Michigan, Fraternal Order of Police Lodge 95, Detroit Fire Fighters Association. Well, it's pretty obvious that these are employee groups. I think as rebuttal exhibits, that I'll go ahead and receive them.

MR. GARTNER: Thank you, your Honor.

THE COURT: And for what the relevance, if any, of those documents can be argued at some later time.

(Defendants' Exhibits 14 through 37 were offered and [542] received.)

CONTINUED DIRECT EXAMINATION OF WEBSTER BUELL

BY MR. GARTNER:

Q Mr. Buell, I'm showing you copies of proposed Exhibits 12 and 13, and can you identify those for the record, please?

A These are microfilm copies of advertisements that I secured that were apparently paid for by the Bay Area Chamber of Commerce political action committee and appeared in issues of the Bay City Times.

Q Can you tell the Court how you found these ads?

A Yes. As part of the development of data for the expert witness, we went through reports of various chamber PACs, and when we looked at the Bay Area Chamber PAC, which was one of the larger chamber political action committees, we found what I thought was unusual, a report of an independent expenditure by a PAC. And so then I went to the Michigan State Library, State of Michigan Library, actually, and looked at microfilm of the Bay City Times, which was the reported recipient of the expenditure, and the dates about the time the expenditure was made, and found these ads appearing in the paper.

Q Is that your handwriting that appears on top of the two ads?

A Yes, it is.

Q All right. And you then obtained copies of the microfilm?

A Yes.

[redacted]

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

[redacted]
[redacted] Secretary of State,
[redacted]
Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

Whether a non-profit corporation formed to promote the interests of the business community, which draws 75 percent of its funds from business corporations, may constitutionally be barred from expending such funds in political campaigns advocating the nomination, election, or defeat of a designated candidate or candidates for public office.

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OPINIONS AND ORDERS OF THE COURTS BELOW

The December 14, 1988 order and the December 27, 1988 amended order of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing en banc are published at 865 F.2d 716 (6th Cir. 1988) and appear in the Appendix to the Jurisdictional Statement at J.S. App. 30a-38a.[1] The September 15, 1988 opinion of the United States Court of Appeals for the Sixth Circuit is published at 856 F.2d 783 (6th Cir. 1988) and appears at J.S. App. 1a-29a. The September 3, 1986 opinion of the United States District Court for the Western District of Michigan is published at 643 F. Supp. 397 (W.D. Mich. 1986) and appears at J.S. App. 39a-77a.

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1 "J.S. App." references are to the Jurisdictional Statement Appendix filed by the Appellants. "J.A." references are to the Joint Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 15, 1988. It held Mich. Comp. Laws Ann. ("MCL") § 169.254(1) (West 1988 Supp.), a provision of the Michigan Campaign Finance Act ("Campaign Act"), 1976 Mich. Pub. Acts 388, Mich. Comp. Laws Ann. §§ 169.201 et seq. (West 1988 Supp.) which requires that corporations finance candidate political contributions and expenditures through separate segregated funds, unconstitutional as applied to the Michigan State Chamber of Commerce. The Michigan State Chamber of Commerce is "a nonprofit Michigan corporation ... comprised of about eight thousand voluntary members, approximately seventy-five percent of whom are

corporations." (J.S. App. 3a). A petition for rehearing en banc was denied on December 14, 1988. (J.S. App. 30a-31a). The Appellants filed a timely Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on March 3, 1989. (J.S. App. 79a). On March 10, 1989, the Appellants filed their Jurisdictional Statement, and on May 1, 1989, the Court noted probable jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute at issue, Mich. Comp. Laws Ann. § 169.254(1) (West 1988 Supp.), in pertinent part, states:

> Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure ....

The other relevant provisions of the Campaign Act are reprinted at J.S. App. 83a-109a.

STATEMENT OF THE CASE

A. Background

For over seventy-five years, the Michigan legislature has recognized that election activity in candidate elections by business organizations in the corporate form poses special problems of corruption and the appearance of corruption. In 1913, six years after Congress passed the Tillman Act[2], Michigan enacted the Corrupt Practices Act[3] which banned

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2 Act of 1907, ch. 420, 34 Stat. 864 (1907).

3 1913 Mich. Pub. Acts 109.

the use of corporate treasury funds for the payment of election expenses. This statutory ban withstood a constitutional attack in People v. Gansley, 191 Mich. 357; 158 N.W. 195 (1916). See also Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 490-493; 242 N.W.2d 3 (1976). Consistent with this history and its expert judgment that a general prohibition on contributions and expenditures by business corporations in candidate elections is necessary to achieve compelling public interests, the Michigan legislature for decades has protected the integrity of the electoral process by enacting, re-enacting and refining laws[4]

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4 See 1925 Mich. Pub. Acts 351, Pt. 5, Ch. II, § 14; 1954 Mich. Pub. Acts 116, § 919; and 1975 Mich. Pub. Acts 227, § 95.

barring corporations from utilizing treasury funds to finance contributions, expenditures or independent expenditures in connection with candidate elections. At issue in this appeal is the ban on independent expenditures from treasury funds by a non-profit corporation, the Michigan State Chamber of Commerce, formed to promote the interests of the business community, which accepts corporate monies in the form of dues from its thousands of corporate members. The independent expenditures ban prevents the Michigan State Chamber of Commerce from serving as a conduit for corporate treasury money into Michigan candidate elections.[5]

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5 Corporations are not prohibited from making expenditures or contributions in ballot question elections. See, Michigan State Chamber of Commerce v. Austin, 832 F.2d 947 (6th Cir. 1987).

The statute at issue, MCL § 169.254(1), prohibits "a corporation" from utilizing treasury funds to finance independent expenditures in connection with a state candidate election. An independent expenditure is defined as an expenditure[6] which "is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." MCL § 169.209(1). The Campaign Act permits, however, the use of such treasury funds

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6 "Expenditure" is defined by § 6 of the Campaign Act as "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." MCL § 169.206(1).

for "the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL § 169.255(1).

Business corporations are restricted to soliciting contributions to those separate segregated funds (political action committees) from stockholders, officers and directors, and executive and administrative personnel of the corporation. MCL § 169.255(2). Non-profit corporations, like the State Chamber, are restricted to soliciting contributions for political action committees from individual members and their spouses, stockholders, officers and directors, and executive and administrative personnel of the non-profit corporation. MCL § 169.255(3).

A separate segregated fund must register with the Michigan Department of State as an "independent committee"[7] or a "political committee"[8] and is subject to registration and reporting requirements.[9] Similarly, any "person"[10] who receives

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7 "Independent committee" is defined by § 8(2) of the Campaign Act. MCL § 169.208(2).

8 "Political committee" is defined by § 11(2) of the Campaign Act. MCL § 169.211(2).

9 The registration and reporting requirements are contained in §§ 24-26, 28, 31-33, 32, 33, 35-38 of the Campaign Act. MCL §§ 169.224, 169.225, 169.226, 169.228, 169.231, 169.232, 169.233, 169.235, 169.236, 169.237, and 169.238.

10 "Person" is defined by § 11(1) of the Campaign Act as a "business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." MCL § 169.211(1).

contributions or makes expenditures in connection with a state candidate election in the amount of $200.00 or more in a calendar year, is a "committee"[11] for purposes of the Campaign Act and is subject to registration and reporting requirements.

The Michigan State Chamber of Commerce ("State Chamber") is a non-profit, multi-purpose, membership corporation formed in 1959 under Michigan law to promote the common good and the interests of the Michigan business community. (J.S. App. 3a; J.A. 3a, 42a, 121a-122a, 142a, 147a). The State Chamber's objectives include "promot[ing]

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11 "Committee" is defined by § 3(4) of the Campaign Act. MCL § 169.203(4).

conditions favorable to the economic development of the State of Michigan," "analyz[ing], compil[ing] and disseminat[ing] information on laws and regulations of interest to the members," "collect[ing] data and mak[ing] investigations and surveys relative to matters of social, civic, and economic importance to the State of Michigan," and receiving expenditures and making political contributions. (J.A. 43a-44a). More than 75 percent of the 8,000 members of the State Chamber are profit-making business corporations, such as General Motors, Ford, and Chrysler. (J.S. App. 3a, 33a; J.A. 134a). All State Chamber members, corporate and non-corporate, are assessed and pay annual dues to the State Chamber. (J.S. App. 3a; J.A. 45a-46a).

On June 10, 1985, a special election was scheduled to be held to fill a vacancy caused by the resignation of the incumbent in the 93rd Legislative District for the Michigan House of Representatives. (J.S. App. 4a, 42a-43a). Through a paid advertisement in the June 9, 1985 Grand Rapids Press, the State Chamber sought to make an independent expenditure out of its treasury funds in support of Richard Bandstra, a candidate in the special election.[12]

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12 The State Chamber, if it had desired, could have paid for the advertisement in question through its separate segregated fund, the State Chamber Political Action Committee, which was established in 1977. (J.A. 143a). Indeed, that Committee, the largest and most successful state chamber political action committee in the United States, had a projected balance of over $140,000.00 to spend in the 1986 elections. (J.A. 143a, 161a-162a).

(J.S. App. 4a; J.A. 17a). Because a violation of the ban on independent expenditures in candidate elections by a corporation constitutes a felony, punishable by a fine of $10,000.00, the State Chamber was precluded from making the independent expenditure at issue.[13] The State Chamber, therefore, on May 24, 1985 filed an action in the United States District Court for the Western District of Michigan for declaratory and injunctive relief against Appellants Richard H.

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13 MCL § 169.254(5) imposes criminal penalties upon violators of § 54(1) of the Campaign Act:

> A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00.

Austin, Secretary of State, and Frank J. Kelley, Attorney General, challenging the constitutionality of MCL 169.54(1) which prohibits corporate independent expenditures in candidate elections. (J.A. 154a-155a).

B. The Decisions of the Courts Below

Following the completion of discovery, a four-day non-jury trial was conducted before the Honorable Douglas W. Hillman, Chief Judge, on May 9 and 12, 1986, and June 12 and 13, 1986. (J.S. App. 43a). Seven witnesses testified and numerous exhibits were introduced into evidence. (J.S. App. 43a-44a). Judge Hillman issued his opinion on September 3, 1986 concluding that the ban on corporate independent expenditures in candidate elections as applied to the

State Chamber was not violative of the First Amendment because the ban "serve[d] the state's compelling interest in preventing corruption or the appearance of corruption in the electoral process." (Footnote omitted.) (J.S. App. 59a). The Court further found that § 54(1) was valid under the Equal Protection Clause of the Fourteenth Amendment. (J.S. App. 72a). Accordingly, on September 3, 1986, the District Court entered a judgment in favor of Appellants and against the State Chamber. (J.S. App. 78a).

On September 16, 1986, the State Chamber filed its Notice of Appeal with the United States Court of Appeals for the Sixth Circuit. (J.A. 34a-35a). On September 15, 1988, the Court of Appeals reversed holding that § 54(1) as applied

to the State Chamber is unconstitutional, "for it infringes upon speech at the core of the first amendment without a compelling justification." (Footnote omitted.)[14] (J.S. App. 28a). In its holding, the Court of Appeals concluded that the instant case was controlled by this Court's holding in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986), involving a parallel federal statutory provision requiring that cor-

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14 In view of its holding, the Court of Appeals did not consider the State Chamber's assertions that MCL § 169.254(1) is not "precisely drawn," or that it violates the Equal Protection Clause. (J.S. App. 28a-29a). It is clear, however, that the State Chamber's equal protection claim is meritless. Federal Election Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 258-259 n. 11 (1986).

porate election expenditures be financed through separate segregated funds. (J.S. App. 14a).

On September 28, 1988, Appellants filed a petition for rehearing en banc in the Court of Appeals. On December 14, 1988, an order was entered denying the petition. (J.S. App. 30a). Four judges of the Sixth Circuit on December 27, 1988 dissented from the order denying the petition for rehearing en banc, asserting that the Court of Appeals decision violated this Court's holding in MCFL, supra. (J.S. App. 32a-38a).

SUMMARY OF ARGUMENT

In a long line of cases, this Court has recognized the beneficial economic attributes of the corporate form of

organization and has upheld First Amendment restrictions against corporations in the arena of political activity. The corporate form permits substantial accumulation of economic power and restrictions are, therefore, necessary both to ensure that economic advantage is not automatically translated into political advantage and to ensure that individuals' contributions to the corporation, made for other purposes, are not used for political activity to which the individuals are opposed. The Court's teachings in cases such as Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982), California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) and United States v. United Auto Workers, 352 U.S. 567 (1957), lead to the

inescapable conclusion that a state or the federal government may permissibly restrict independent political expenditures by traditional commercial business corporations.

In Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), however, this Court created a narrow exception to this general rule, because of the unique attributes of the particular entity. The corporation there was found to be more like a voluntary political association than a business firm and, consequently, did not pose the threat that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." 479 U.S. at 257.

In the instant case, Appellants State officials contend that the Campaign Act permits Appellee State Chamber to engage actively in independent political speech. Even if Michigan's prohibition on corporate independent political expenditures burdens the State Chamber's First Amendment rights however, the statute is justified by a compelling state interest since the State Chamber is much more like a traditional commercial business corporation than a voluntary political association. The State Chamber possesses none of the features which the Court found essential in MCFL, 479 U.S. at 263-264: 1) The State Chamber has economic resources which are unrelated to its political support; 2) It has significant business purposes which create disincentives for its members to disassociate

themselves even if they disagree with its political activities, and; 3) Its members include thousands of traditional business corporations which would permit the State Chamber to act as a conduit for expenditures which would be prohibited if attempted directly. Because unrestricted independent spending by the State Chamber would create a threat to the political marketplace, Michigan may prohibit the State Chamber from making independent political expenditures.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN HOLDING SECTION 54(1) UNCONSTITUTIONAL AS APPLIED TO THE MICHIGAN STATE CHAMBER OF COMMERCE, A NON-PROFIT CORPORATION FORMED TO PROMOTE THE INTERESTS OF THE BUSINESS COMMUNITY, WHICH DRAWS 75 PERCENT OF ITS FUNDS FROM BUSINESS CORPORATIONS.

The teachings of this Court's decisions in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986), Federal Election Commission v. National Right to Work Committee, ("NRWC"), 459 U.S. 197 (1982), and previous cases involving restrictions on expenditures and contributions by corporations in candidate elections establish that the statute at issue, MCL § 169.254(1), serves compelling governmental purposes and that it is constitutional as applied to the

Michigan State Chamber of Commerce. The Court of Appeals failed to follow these controlling opinions. Instead, the Court below premised its ultimate holding on a disclosure statute, MCL § 169.251(1), which is not applicable to conduit corporations like the State Chamber. A conduit corporation is a "committee" under the Campaign Act[15] and the disclosure statute relied upon by the Court of Appeals applies only to a "person other than a committee."[16] If the Court of Appeals had followed the precedents of this Court, the result would have been markedly different.

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15 MCL § 169.203(4).

16 MCL § 169.251(1).

A. MCFL Confirms That Restrictions On Corporate Expenditures Are Constitutional As Applied To "Traditional Corporations."

The logic of MCFL and the earlier decisions cited therein compels the conclusion that § 54(1) as applied to traditional business corporations "organized for economic gain," MCFL, 479 U.S. at 259, quoting Federal Election Commission v. National Conservative Political Action Committee, ("NCPAC"), 470 U.S. 480, 500 (1985), is constitutional. Although the Court in MCFL did not address the issue of whether the ban on independent expenditures by profit-making corporations is constitutional, the precedents established by this Court in cases such as Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982),

California Medical Association v. Federal Election Commission, 453 U.S. 182 (1981) and United States v. UAW, 352 U.S. 567 (1957), foreclose any argument that § 54(1)'s prohibition of corporate independent expenditures is unconstitutional as applied to traditional business corporations.

In NRWC, this Court unanimously rejected a challenge to 2 U.S.C. § 441b(b)(4)(C), which places a restriction on the persons who can be solicited by, inter alia, corporate Political Action Committees ("PACs"), but does permit corporations with shareholders or members to solicit those persons for contributions to their PACs. NRWC's political action committee had attempted to solicit persons, other than its members, who had responded to NRWC's mailing indicating support for the organization's policy interests. Because NRWC's political action committee expended corporate treasury funds for that purpose, it violated 2 U.S.C. § 441b. NRWC argued that the people it had solicited should be considered members under the Federal Election Campaign Act and that restricting its PAC's solicitation to only "members" violated the First Amendment. This Court concluded that the persons solicited by NRWC were not its members and upheld the constitutionality of § 441b's ban on such corporate spending.

In reaching this conclusion, the Court observed that, although "[t]he statutory purpose of 441b ... is to pro-

hibit contributions or expenditures by corporations or labor organizations in connection with federal elections," the statute "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of 'separate segregated fund[s],' which may be 'utilized for political purposes.'" Federal Election Commission v. National Right to Work Committee, 459 U.S. at 201. The Court recognized that this statutory scheme was designed to serve at least two important governmental purposes: "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to

incur political debts from legislators who are aided by the contributions;" Id. at 207, citing United States v. UAW, 352 U.S. at 567, and "to protect the individuals who have paid money into a corporation [or union] for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208, citing United States v. CIO, 335 U.S. 106, 113 (1948).

Noting that "'[t]he importance of the governmental interest in preventing [the corruption of elected officials] has never been doubted,'" the Court found that these dual purposes were sufficient to overcome the corporation's First Amendment objections to the statute.

NRWC, 459 U.S. at 208, quoting First National Bank of Boston v. Bellotti, 435 U.S. at 765, 788 n. 26 (1978). Finally, the Court concluded that "the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes" to avoid unnecessary infringement of First Amendment rights. NRWC, 459 U.S. at 208.

Thus, while acknowledging that "Congress aimed a part of its regulatory scheme at corporations," the Court concluded that "[t]he statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where

corruption is the evil feared." Id. at 209-210.

As discussed in NRWC, Section 441b and its parallel provision, Section 54(1) of the Michigan Campaign Finance Act, serve several purposes which this Court has already found to be compelling. First, it is to ensure that the wealth which corporations are able to accumulate with the aid of special legal protections, intended to serve other purposes, cannot be diverted to the electoral process to incur political debts from candidates for elective office. See, Federal Election Commission v. National Right to Work Committee, 459 U.S. at 207; United States v. UAW, 352 U.S. at 579. Corporations are artificial legal entities endowed by the state with special

advantages, such as limited liability, perpetual life, and special tax treatment in order to facilitate their business objectives. Those special advantages, "so beneficial in the economic sphere, pose special dangers in the political sphere." First National Bank of Boston v. Bellotti, 435 U.S. at 826 (Rehnquist, J., dissenting). This Court has repeatedly recognized the crucial role Section 441b plays in avoiding "the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." United States v. UAW, 352 U.S. at 585.

As previously explained in NRWC and United States v. UAW, Congress in enacting 2 U.S.C. § 441b and its predecessor laws sought to prevent the diversion of the assets of corporations to the political sphere only after it became aware of widespread abuses which were thought to present imminent danger of corruption of the election process, resulting in a decline of public confidence in the integrity of elected officials and in the fair operation of government. Likewise, the Michigan Legislature in enacting § 54(1) and its predecessor laws had the same concerns. See People v. Gansley, 191 Mich. at 376; 158 N.W. at 201. (J.A. 72a-73a). This Court has repeatedly recognized the elimination of these factors to be a governmental interest of the highest order, so that the careful legislative adjustment of the electoral laws to account for the particular legal and

economic attributes of corporations "warrants considerable deference ... [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." NRWC, 459 U.S. at 209.

Similarly, in California Medical Association v. Federal Election Commission, 453 U.S. at 195, the Court held that the "important governmental interests in preventing the corruption or appearance of corruption in the political process" justifies limiting the amount that even an unincorporated association may contribute to a multicandidate political committee formed to express the association's political views.

The second purpose behind § 441b and § 54(1) as applied to business cor-

porations is to protect shareholders who have paid money into a corporation "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, 459 U.S. at 208, citing United States v. CIO, 335 U.S. at 113. Congress made clear that "[t]hese funds belong to the stockholders, and the officers have been forbidden by law for years from using the stockholders' funds in an election for these federal offices." 93 Cong. Rec. 7492 (1947).

Prior to the MCFL decision, this Court recognized in NRWC, California Medical Association v. Federal Election Commission, supra, and United States v. UAW, supra, that expenditures by traditional business corporations pose a

threat to the integrity of the electoral process. The thrust of those decisions clearly establish that a ban on corporate independent expenditures as applied to a traditional business corporation is constitutional.

Finally, this conclusion is consistent with the Court's holdings in Federal Election Commission v. National Conservative Political Action Committee, supra, and Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley, the Court struck down a limit on independent expenditures by individuals and political committees. 424 U.S. at 39-51. In NCPAC, while the Court invalidated a limit on independent expenditures by "any committee, association, or organization (whether or not incorporated)," 470 U.S. at 491, the

Court expressly stated "this is not a 'corporations' case." 470 U.S. at 496. In neither case did the Court consider the constitutionality of a ban on independent expenditures as applied to only corporations.

Therefore, based on the interest of government in preventing corruption or the appearance of corruption, business corporations may be limited in the use of funds amassed through favored treatement of the corporate structure, in candidate elections.

B. MCFL Established A Narrow Exemption From The Ban On Corporate Independent Expenditures For Not-For-Profit Corporations.

In MCFL, 479 U.S. 238 (1986), this Court held, over the dissent of four justices, that a parallel provision of

the Federal Election Campaign Act, 2 U.S.C. § 441b,[17] proscribing independent expenditures financed from corporate treasuries, cannot constitutionally be applied to a small, grass-roots group incorporated to advocate a political issue, if it has no financial ties with profit-making businesses and if it derives all of its funds from the voluntary contributions of individuals. In carving out this narrow exception from § 441b for MCFL, the Court reaffirmed its previously expressed rationale of limiting corporate participation in can-

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17 A provision of the Federal Election Campaign Finance Act, 2 U.S.C. § 441b, prohibits "any corporation whatever" from using its corporate treasury funds to make expenditures in connection with a federal election. (J.S. App. 13a, n. 3).

didate elections in order to prevent "the corrosive influence of concentrated corporate wealth," 479 U.S. at 257, that could threaten "the integrity of the marketplace of political ideas," Id., and to prevent corporations "from using an individual's money for purposes that the individual may not support." Id. at 260, citing Federal Election Commission v. National Right to Work Committee, 459 U.S. at 208; Pipefitters v. United States, 407 U.S. 385, 414-415 (1972).

In addition, the Court adopted a third rationale for the limitation on corporate expenditures, namely to prevent organizations that accept contributions from business corporations "from serving as conduits for the type of direct spending that creates a threat to the

political marketplace." Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. at 264.

The Court found that these three compelling statutory purposes were not applicable to MCFL, a small, ideological, anti-abortion group, which also happened to be incorporated on a non-profit, non-stock, and non-membership basis, because it was not the type of traditional corporation "that has been the focus of regulation of corporate political activity." Id. at 259. Indeed, grass-roots groups such as MCFL do not pose "the potential for unfair deployment of wealth for political purposes." Id. Thus, this Court concluded that the compelling purposes of Section 441b were inapplicable to MCFL's particular characteristics.

Nevertheless, this Court recognized "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." Id. at 263.

The Court then carefully articulated the basis for its conclusion that 2 U.S.C. § 441b could not be applied to MCFL's expenditures, noting that the "class of organizations affected by our holding today [may] be small," Id. at 264, and setting out three features of MCFL that were "essential" to its decision:

> ... First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. ... Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. ... Third, MCFL was not established by a business corporation or a labor union,

> and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.
> MCFL, 479 U.S. at 264.

In sum, only organizations possessing all of those three features are affected by the Court's holding in MCFL. 479 U.S. at 264 n. 13. As to the other type of "traditional corporations," this Court acknowledged that the corporate expenditure restriction is necessary in order "to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,'" and that "'the special characteristics of the corporate structure require particularly careful regulation.'" MCFL, 479 U.S. at 256, 257, quoting NRWC, 459 U.S. at 207, 209-210.

C. Section 54(1) Is Constitutional As Applied To The State Chamber Because It Does Not Fall Within The MCFL Exemption.

The State Chamber cannot satisfy the three-part test established by this Court in MCFL to exempt itself from the operation of § 54(1) for several reasons. The State Chamber accepts corporate money from its 6,000 corporate members in the form of dues. Thus, in contrast to MCFL, the State Chamber can serve as a "conduit for the type of direct spending that creates a threat to the political marketplace." MCFL, 479 U.S. at 264.

The Court below overrode this careful limitation by treating it as if it read "conduits for massive undisclosed corporate political spending," and by then reading the applicable provisions of the

Campaign Act to require the State Chamber to disclose the sources of its political support. The Court of Appeals conclusion cannot be sustained on either point.

The MCFL limitations do not exclude only undisclosed corporate political contributions: they exclude any corporate money. The great body of federal and state laws regulating political contributions and expenditures and the opinions of this court rest upon the realization that disclosure is not always a sufficient safeguard against the appearance and actuality of corruption resulting from large political contributions and expenditures. "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives have long been

recognized." (Citation omitted.) Federal Election Commission v. National Right to Work Committee, 459 U.S. at 210.

Judge Merritt, in the dissent from the denial of en banc review, acknowledged that because the State Chamber accepts corporate money from its 6,000 corporate members, it will serve as a conduit "for the type of direct spending that creates a threat to the political marketplace." (Citation omitted.) (J.S. App. 35a). Accordingly, Judge Merritt concluded that the decision below disregarded the third limitation set forth in MCFL:

> The panel decision, therefore, permits the very evil which all members of the Supreme Court agreed a state could prohibit. The panel allows the Chamber to serve as a conduit for the type of direct spending that Michigan legislators believe creates a threat to the political marketplace. (Citation omitted.) (J.S. App. 36a).

Even if the State Chamber reports corporate donations which are intended for election expenditures, it could still act as a conduit for corporate funds. It was MCFL's inability to act as a conduit that this Court found crucial to its conclusion that the statutory purposes of the Federal Election Campaign Act were inapplicable.

Furthermore, the Michigan disclosure statute[18] erroneously cited by the Court of Appeals does not apply to the State Chamber or other incorporated conduits of the funds of business corporations. Thus, if the decision below is followed, the State Chamber and other conduit cor-

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18 MCL § 169.251(1).

porations would be able to accept corporate money in the form of dues from any "member" business corporation and convert such money into political expenditures on behalf of political candidates, without ever disclosing the true source of financing. Voters will, thereby, be denied the true identity of a candidate's constituency and the source of campaign finances. See Buckley v. Valeo, supra, 424 U.S. at 81.

In addition, the record evidence establishes that the State Chamber fails to meet the first and second prongs of the MCFL test. First, the State Chamber, as compared to MCFL, was not formed for the express purpose of promoting political ideas. To the contrary, it was organized primarily for the purpose of

promoting the interests of the business community in Michigan. (J.S. App 3a; J.A. 3a, 42a, 121a-122a, 142a, 147a). The State Chamber engages in a myriad of business and commercial transactions including the publication of newsletters and reports and the presentation of seminars and conventions. (J.A. 40a-42a, 121a-122a, 160a-161a). Second, although the State Chamber has no shareholders, many of its corporate members have shareholders who have an interest in the member corporation's assets or earnings. Such individuals do not necessarily pay money into a corporation to further that entity's political purposes.

The State Chamber clearly fails to meet the three essential criteria set forth by this Court in MCFL. Unlike

MCFL, the State Chamber has features more akin to a business corporation. It was established for the purpose of promoting the interests of the business community in Michigan and engages in a multitude of business activities. It accepts corporate money in the form of dues from its thousands of corporate members. Thus, the State Chamber represents on all fours the type of conduit corporation which this Court excluded from its 5-4 opinion in MCFL. Accordingly, reliance by the Sixth Circuit on the holding in MCFL was erroneous and is grounds for reversal by this Court.

II

THE MICHIGAN CAMPAIGN FINANCE ACT PERMITS THE STATE CHAMBER TO ENGAGE ACTIVELY IN INDEPENDENT POLITICAL SPEECH.

The concerns expressed by this Court in MCFL, that the requirement of a for-

malized organization may deter some ideological groups from engaging in political expression and that statutory limitations on political action committee solicitation may result in less money being available for independent expenditures than if general treasury funds could be used, are not applicable to the State Chamber. MCFL, 479 U.S. at 254-255. The evidence clearly establishes that § 54(1) does not impermissibly restrict the amount, content or methods of the State Chamber's protected speech.

The State Chamber was formed in 1959, over thirty years ago. (J.A. 124a). It represents the interests of over 8,000 Michigan corporations and businesses "engaged in civic, professional, commer-

cial, industrial, agricultural and recreational enterprises." (J.A. 3a). More than 75% of the members of the State Chamber are corporations. (J.A. 134a). The majority of its corporate members are profit-making corporations. (J.A. 134a). The State Chamber is primarily funded by the annual dues paid by its members. (J.S. App. 2a-3a). Thus, in contrast to MCFL, the State Chamber has a substantial membership base and has a steady and reliable source of financial resources. Cf., MCFL, 479 U.S. at 242.

Moreover, the record evidence establishes that the State Chamber has been able to be actively involved in the political process and is very much involved in electoral politics in Michigan. For example, the State Chamber

has, inter alia, expended its treasury funds for the purpose of: establishing, administering and soliciting contributions to its highly successful political action committee; lobbying members of the legislative and executive branches of state government; contributing to ballot question committees; donating to an elected official's officeholder expense fund; communicating its views through advertisements to the electorate on legislative and public policy issues; funding a reapportionment lawsuit; and communicating its views on political issues to executive and administrative personnel of member corporations. (J.A. 138a, 144a-147a, 163a-168a). In addition, provisions of the Campaign Act permit the State Chamber to expend its treasury funds for the purpose of con-

ducting nonpartisan registration and get-out-the-vote campaigns and contributing to political party organizational activities. MCL § 169.206.

The record evidence also establishes that the State Chamber Political Action Committee established by the State Chamber is efficiently run, well-financed and highly successful. The State Chamber Political Action Committee was established in 1977 and has made political expenditures in every election since it was established. (J.A. 136a, 148a). The State Chamber PAC has been an exceedingly effective mechanism in generating political support for political candidates responsive and congenial to its point of view. For example, in the November, 1980 general election, 63

out of 66 State Chamber PAC-endorsed candidates for the Michigan House of Representatives were successful. (J.A. 162a). In two special elections conducted in the Spring 1984, the two State Chamber PAC-endorsed candidates for the Michigan State Senate were successful. (J.A. 162a). In the November, 1984 general election, 64 out of the 67 State Chamber PAC-endorsed candidates for the Michigan House of Representatives were successful. (J.A. 162a). The State Chamber PAC was the largest contributor in almost every candidate race in which it participated in the 1983-1984 election cycle. (J.A. 162a).

The State Chamber has successfully encouraged and assisted corporations, trade and professional associations, and

local chambers of commerce in forming political action committees. (J.A. 157a). Pursuant to these efforts by the State Chamber, the number of business and professional political action committees in Michigan has grown from 30 in 1976 to over 200 in 1986. (J.A. 157a-158a). The State Chamber set a fundraising record in the 1983-1984 election cycle, soliciting contributions in the amount of $102,000.00 for the State Chamber PAC. (J.A. 162a). For the 1985-1986 election cycle, the State Chamber expected to raise over $140,000.00 in voluntary contributions for the State Chamber PAC. (J.A. 143a). Through the efforts of the State Chamber, Michigan has the largest number of chamber political action committees in the country. (J.A. 169a).

Finally, the record evidence refutes the concern set forth by this Court in MCFL that the administrative and financial burdens of establishing and maintaining a PAC in order to finance election expenditures are substantial enough to discourage some small, informal organizations like MCFL from engaging in political speech. MCFL, 479 U.S. at 254-255. Here, the evidence shows that the costs of establishing the State Chamber PAC were minimal and that the costs of maintaining the State Chamber PAC are so insignificant that the State Chamber does not even maintain such financial information. (J.A. 138a-140a). Further, the State Chamber regularly and successfully distributes "how-to-do-it" kits to its corporate members, who, because of the efforts of the State

Chamber, have seen in the last few years an increase of over 600% in the number of PACs sponsored by Michigan corporations. (J.A. 156a-162a).

The ability of the State Chamber to engage in political speech has not been burdened or inhibited by the disclosure, organizational and solicitation restrictions of the Michigan Campaign Finance Act. As compared to the MCFL, the State Chamber had already successfully established a separate segregated fund shortly after the enactment of the Michigan Campaign Finance Act in December, 1976. Cf., MCFL, 479 U.S. at 255 n. 8. In contrast to the MCFL, the State Chamber failed to produce any record evidence that the organizational requirements of the Michigan Campaign

Finance Act adversely affects its ability to finance its affluent PAC. Cf., MCFL, 479 U.S. at 226 (O'Connor, J., concurring). Accordingly, there is no basis to conclude that § 54(1) impermissibly burdens the First Amendment rights of the State Chamber.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals that MCL § 169.254(1) is unconstitutional as applied to the Michigan State Chamber of Commerce should be reversed.

Respectfully submitted,

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QUESTIONS PRESENTED

I.

WHETHER THE WHOLESALE PROHIBITION OF CORPORATE INDEPENDENT EXPENDITURES ADVOCATING THE ELECTION OR DEFEAT OF A CANDIDATE FOR POLITICAL OFFICE VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

WHETHER A STATE STATUTE WHICH ABSOLUTELY PROHIBITS ALL NON MEDIA CORPORATIONS, BUT NOT MEDIA CORPORATIONS, LABOR UNIONS, PARTNERSHIPS, OR OTHER UNINCORPORATED ENTITIES, FROM ADVOCATING THE ELECTION OR DEFEAT OF A CANDIDATE FOR POLITICAL OFFICE THROUGH INDEPENDENT EXPENDITURES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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No. 88-1569

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,

Appellants,

v

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF APPELLEE MICHIGAN STATE CHAMBER OF COMMERCE

STATEMENT OF THE CASE

In Michigan, it is a felony for nonmedia corporations to engage in fundamental First Amendment political speech. Under the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, as amended, Mich. Comp. Laws Ann. §169.201 (West Supp. 1989) *et seq.* ("Act 388"), a corporation "may not make a contribution or expenditure" in support of or in opposition to political candidates. Mich. Comp. Laws Ann. §169.254(1) (West Supp. 1989). The state applies Section 54(1) of Act 388 in a manner not only to prohibit corporate contributions and expenditures, but to also prohibit corporate *independent expenditures* in support of or in opposition to political candidates (hereafter "independent expenditures"). An independent expenditure is defined as:

> [A]n expenditure as defined in Section 6 by a person *if the expenditure is not made at the direction of, or under the control of, another person* and if the expenditure is not a contribution to a committee. [Emphasis added] [Mich. Comp. Laws Ann. §169.209(1) (West Supp. 1989)]

All corporations, except media corporations[1], regardless of their purpose, size, or wealth, are totally prohibited from making independent expenditures. Act 388, however, does not similarly restrict independent expenditures made by individuals, unions, partnerships or other unincorporated organizations.

Appellee, the Michigan State Chamber of Commerce ("State Chamber"), is a Michigan nonprofit membership corporation with approximately 8,000 members representing, among other things, manufacturing, retail, agricultural, finance, construction, and wholesale businesses. [J.A. 121a-123a (Barrett Testimony)]. Approximately 15% of the State Chamber's members have 10 employees or less; 57% have 50 employees or less; 80% have 100 employees or less; and only 20% have more than 100 employees. [J.A. 122a (Barrett Testimony)]. Thus, contrary to the Appellants' mischaracterization, the majority of the State Chamber's members are small businesses and not mega corporations such as General Motors and Ford Motor Company.

The State Chamber is an ideological corporation formed to promote the common good and interests of the Michigan business community. [J.A. 121a (Barrett Testimony)]. It is important for the State Chamber and all businesses, whether incorporated or not, to be involved in electoral politics because elected officials make decisions in the legislative and

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[1] Section 6(3)(d) excludes expenditures made by the media from the definition of expenditure. Mich. Comp. Laws Ann. §169.206(3)(d) (West Supp. 1989).

regulatory process which directly impact the business community. [J.A. 125a (Barrett Testimony)].

In addition, unincorporated entities, such as unions, directly participate in Michigan electoral politics because they are not prohibited at all from speaking through independent expenditures.[2] Labor unions often line up on the opposite sides of issues and candidates from the business community, and, thus, it is important for the State Chamber to be allowed to also directly speak through independent expenditures in electoral politics [J.A. 149a (LaBrant Testimony)].

In 1985, a special election was called to fill a vacancy in the Michigan House of Representatives. The State Chamber sought to make a public statement through a one-quarter page advertisement in the *Grand Rapids Press* to support Richard Bandstra, one of the candidates. [J.A. 60a (Plaintiffs' Exhibit 14)]. The State Chamber's statement in support of Richard Bandstra would have been an independent expenditure because it would not have been made at the direction of, controlled by, or coordinated with the candidate committee. [J.A. 154a-155a (LaBrant Testimony)]. Because of the criminal felony provisions of Section 54(3), however, the State Chamber did not publish its statement. [J.A. 155a (LaBrant Testimony)].

On May 24, 1985, the State Chamber filed a Complaint in the United States District Court for the Western District of Michigan (the "Trial Court") challenging the constitutionality of the prohibition against corporate independent expenditures as a violation of the State Chamber's and its members'

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[2] Labor unions may also make contributions and expenditures directly to or on behalf of a candidate.

free expression and equal protection rights under the Michigan and United States Constitution.[3] [J.A. 3a].

The Trial Court found that Act 388 did not infringe upon free expression or equal protection rights because it served the state interest in preventing real or apparent corruption. *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986) [Jurisdictional Statement Appendix 39a, 59a].[4]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the decision of the Trial Court and held that the prohibition against corporate independent expenditures violates the State Chamber's First Amendment rights. *Michigan State Chamber of Commerce v. Austin*, 865 F.2d 716 (6th Cir. 1988); [J.S.App. 1a]. The Sixth Circuit did not find it necessary to address the State Chamber's least restrictive means analysis or equal protection challenge to Act 388. [J.S.App. 28a-29a].

SUMMARY OF THE ARGUMENT

In this case a nonprofit corporation having profit corporation members is challenging a state statute absolutely prohibiting corporate independent expenditures. The only legitimate compelling state interest under the First Amendment for prohibiting political speech through independent expenditures is to prevent real or apparent corruption.

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[3] Article I, §§ 2, 3, and 5 of the Michigan Constitution are construed identically with the First and Fourteenth Amendments to the United States Constitution. *See e.g. Mutchall v. City of Kalamazoo*, 323 Mich. 215, 227; 35 N.W.2d 245 (1948); *People v. Walker*, 135 Mich. App. 267, 276; 354 N.W.2d 312 (1984).

[4] References to the Jurisdictional Statement Appendix shall be made as [J.S.App.].

This Court has consistently held that independent expenditures by their very nature do not cause real or apparent corruption. The state has never presented any evidence regarding corporate independent expenditures which would alter this analysis. The state's own expert testified that there is no evidence of corruption arising from corporate independent expenditures. The absence of prearrangement and coordination will undermine the value of the independent expenditure to the candidate thereby alleviating any danger of corruption whether it is made by a corporation, a wealthy political action committee ("PAC"), or a wealthy individual.

Even if the state had presented some evidence of corruption, Michigan's statute violates the First Amendment because it is both overinclusive and underinclusive. All corporations, regardless of their size, wealth, or influence, are flatly prohibited from making independent expenditures; but unincorporated entities, such as unions and partnerships, are not restricted at all. These unincorporated entities share many of the same benefits as corporations and have a similar ability to amass wealth in the economic marketplace. But unlike corporations, unions and other unincorporated entities are allowed to use their "large aggregations of wealth" in the political marketplace. The state has not, and cannot, explain why the independent expenditures of these entities differ from corporate independent expenditures in their impact on the electoral process.

Shareholder protection, the only other justification presented by the state, also cannot justify the prohibition against corporate independent expenditures. Elected officials enact legislative and administrative regulations which directly impact the business of a corporation. When a member joins the State Chamber (or a shareholder invests in a corporation), they delegate to the Board of the Directors the authority to make business decisions on behalf of the corporation. These business decisions necessarily involve legisla-

tive actions and administrative regulations—and the elected officials who make them. If a member of the State Chamber or a shareholder in a corporation disagrees with a decision made by the Board of Directors or its officers, they may elect new directors, seek to amend the bylaws, bring a derivative action, or even withdraw their membership or investment from the corporation. Thus, shareholder protection cannot justify the total prohibition against corporate independent expenditures.

In addition, the Michigan statute is both overinclusive and underinclusive if shareholder protection is the justification for the absolute prohibition against corporate independent expenditures. Again, unions, partnerships, and other unincorporated entities are not prohibited at all from making independent expenditures. The individuals investing and/or participating in these entities share many of the same attributes as corporate shareholders. The fact that the state makes no attempt to protect their investments undermines its concern for shareholder protection. The state also makes no exception where all the shareholders consent to a corporate independent expenditure. Thus, because the statute is both underinclusive and overinclusive, shareholder protection does not justify Michigan's prohibition against corporate independent expenditures under the First Amendment.

The statute also violates the Equal Protection Clause of the Fourteenth Amendment because it does not restrict unions and other unincorporated entities. The state cannot treat these entities differently from corporations unless it can show that their independent expenditures are less likely to cause harm. Again, the state has not, and cannot, show that corporate independent expenditures create any more corruption or have any different impact upon the electoral process than the independent expenditures of a union or a large partnership. Unlike the federal statute, which treats unions and corporations the same, Michigan's disparate treatment of

corporations and unions violates the Equal Protection Clause.

Finally, Michigan's statute violates the Equal Protection Clause because it allows media corporations to make independent expenditures. The First Amendment does not accord any special protection to media corporations. There is, therefore, no reason why a media corporation should be treated any differently than a nonmedia corporation.

The First Amendment protects the public's right to be fully informed. By silencing some corporations, but allowing other economic entities to speak freely, the state is clearly violating the First Amendment: The state cannot dictate *who* will speak and *what* they will say. The prohibition against corporate independent expenditures in Michigan, therefore, is unconstitutional under the First and Fourteenth Amendments.

ARGUMENTS

I. ACT 388'S ABSOLUTE PROHIBITION AGAINST CORPORATE INDEPENDENT EXPENDITURES FOR ADVOCACY VIOLATES THE FIRST AMENDMENT.

The First Amendment issue in this case has never been squarely presented to this Court. For the very first time, a nonprofit ideological corporation having profit corporation members is challenging a prohibition against pure speech through corporate independent expenditures for political advocacy. If the Sixth Circuit is reversed, it will be the *first* and *only* time this Court will have suppressed pure speech through independent expenditures. The Court, therefore, must affirm the Sixth Circuit's decision and thereby affirm the long standing commitment to protect pure First Amendment speech.

Independent expenditures for advocacy in political elections represent pure speech within the traditional core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Independent expenditures are part of the most highly protected speech because they represent speech that is "intimately related to the process of governing . . ." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("*NCPAC*"); *Buckley, supra*, 424 U.S. at 19-21. Independent expenditures for advocacy in support of or in opposition to a candidate for political office are entitled to no less protection "under the First Amendment than the discussion of political policy generally or the advocacy of the passage or defeat of legislation." *Buckley, supra*, 424 U.S. at 48.

The fact that a corporation is making the independent expenditure also does not lessen the protection afforded under the First Amendment:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. [Footnotes omitted] [*Bellotti, supra*, 435 U.S. at 777]

Thus, corporate independent expenditures, *in contrast to contributions*, are accorded the greatest degree of First Amendment protection under the most demanding standard of judicial review.

The most demanding standard of judicial review is strict or exacting scrutiny. *See Bellotti, supra*, 435 U.S. at 786. Under this standard, the state must prove that its prohibition against corporate independent expenditures is a narrowly tailored means of serving a compelling state interest. *See Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535 (1980).

The state argues that Act 388 serves the compelling state interests in: (1) preventing large aggregations of corporate wealth from corrupting the political process, either directly or through conduit organizations, and (2) protecting corporate shareholders. The Sixth Circuit correctly held that the State Chamber's independent expenditures do not present these dangers and that Act 388 does not serve the state's purported interests in preventing corruption or protecting shareholders.

A. Act 388's Absolute Prohibition Against Corporate Independent Expenditures Does Not Serve The Compelling State Interest In Preventing Real Or Apparent Corruption.

Preventing real or apparent corruption in the electoral process is the *only* legitimate compelling state interest for restricting independent expenditures. *NCPAC, supra*, 470 U.S. at 496-497.

Because of the lack of evidence, the Trial Court did not find that the State Chamber's independent expenditures would corrupt the electoral process. Instead, the Trial Court held that corporate independent expenditures "*may* . . . create an atmosphere of distrust or the appearance of corruption." (Emphasis added) [J.S.App. 64a]. The Trial Court cited *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982) ("*NRWC*"), for the proposition that "Courts should

not 'second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.' " [J.S.App. 65a].

The Sixth Circuit correctly rejected this reliance upon a broad prophylactic rule because *this case* involves "independent expenditures"—not "contributions".

In *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 259-260 (1986), this Court distinguished *NRWC*, a contributions case, and also soundly rejected any reliance upon broad prophylactic rules where independent expenditures are involved:

> *National Right to Work Committee* . . . upheld the application to a non-profit corporation of a different provision of §441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates . . . . We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending . . . .
>
> In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that non-member corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than §441b provides. [Citations omitted]

See also NCPAC, 470 U.S. at 495-496.

The standard of review required for independent expenditures is "rigorous." *NCPAC, supra*, 470 U.S. at 501. At issue is not the fine-tuning of prophylactic limitations, but the wholesale restriction of clearly protected speech. *Id.* The desirability of a broad prophylactic rule, therefore, without some *proof* of corruption, cannot justify Act 388's wholesale prohibition of First Amendment speech through independent expenditures for advocacy.

Each and every time that this Court has considered a prohibition against independent expenditures, it has concluded that there is *no proof* of corruption. *Buckley, supra, NCPAC, supra*, and *MCFL, supra*. In *Buckley, supra*, a case involving individual independent expenditures, this Court found:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. *[Buckley, supra, 424 U.S. at 47]*

In *NCPAC, supra*, involving PAC independent expenditures, the Court also found:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns . . . . But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate . . . . The Court con-

cluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign . . . .

We think the same conclusion must follow here. It is contended that, because the PACs by the breadth of their organizations spend larger amounts than the individuals in *Buckley*, the potential for corruption is greater. But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view . . . . [H]ere, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more. *[NCPAC, supra*, 470 U.S. at 497-498]

The State Chamber's independent expenditures would not differ from an individual's or a PAC's independent expenditures so as to affect the conclusion reached in *Buckley* and *NCPAC* that independent expenditures, by their very nature, do not cause real or apparent corruption. The state baldly asserts, however, that the State Chamber's independent expenditures would cause real or apparent corruption—but the state has never produced any evidence that an exchange of political favors for uncoordinated expenditures is anything more than a hypothetical possibility.

Virtually all of the state's evidence at trial dealt with a study of PAC activity in Michigan. A corporation can, however, specifically direct a PAC's contributions and independent expenditures. It is difficult to understand, therefore, how a PAC will eliminate or reduce the alleged corruption claimed by the state. Whether made from a PAC or the corporate treasury, the independent expenditure will be identified by the public and by candidates with the particular corporation. [J.A. 104a, 109a (Mayberry Testimony)]. Thus, all of the state's evidence relating to PACs is not only wholly irrelevant to the issue of whether direct corporate independent expenditures cause real or apparent corruption, but also seriously undermines the state's position on this issue.

The record in this case clearly establishes that independent expenditures guard against real and apparent corruption. The state's own expert witness testified that there was *no evidence* of corruption arising from corporate independent expenditures. [J.A. 86a (Epstein Testimony)]. (Mr. Epstein lives and teaches in California, a state which does not prohibit corporate independent expenditures.) Independent expenditures, by their nature, are visible, contribute to public debate, and are subject to rebuttal. [J.A. 111a, 116a-119a (Mayberry Testimony)]. The source of all independent expenditures, including corporate independent expenditures, must be clearly identified. Mich. Comp. Laws Ann. §169.247 (West Supp. 1989). This identification allows the electorate to judge the relative viewpoints expressed. [(J.A. 97a (Mayberry Testimony)]. The high visibility of independent expenditures, including corporate independent expenditures, therefore, deters improper commitments by candidates.

Corporate independent expenditures, like all other independent expenditures, do not necessarily aid a candidate's campaign and, indeed, may actually harm it. The absence of

prearrangement and coordination with a candidate or his agent undermines the value of the expenditure to the candidate and alleviates the danger of a *quid pro quo* for improper commitments from the candidate [J.A. 117a (Mayberry Testimony)]; *Buckley, supra*, 424 U.S. at 47.

The state nonetheless argues that because the State Chamber has profit corporation members, the state may prohibit pure First Amendment speech because it will be made with money amassed from corporate treasuries. The state contends that corporate wealth poses a special danger because such wealth has a "deleterious influence" upon elections.[5] Aside from the undisputable fact that not all corporations have large masses of wealth, the state does not explain how an independent expenditure made by Donald Trump will have any less, or any different, impact upon the electoral process than an independent expenditure by W.S. Smith Company, a closely-held Michigan corporation.[6] In either case, the absence of prearrangement and coordination will undermine the value of the independent expenditure thereby alleviating any danger of corruption. *Buckley, supra*, 424 U.S. at 47.

Moreover, it is contrary to all principles of our society and our government to suppress pure First Amendment speech because the speaker has more or less wealth than other speakers:

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[5] The state cites *NRWC, supra*, and *United States v. UAW*, 352 U.S. 567 (1957). The Court did not address any constitutional issues in *UAW*, and *NRWC* was a contributions—not an independent expenditures—case. Contribution limitations are not subject to as rigorous review. *MCFL, supra*, 479 U.S. at 238-239. Thus, the justifications in *NRWC* do not apply to this case.

[6] Woodward Sidney Smith, who testified at trial, owns the W.S. Smith Company. [J.A. 91a-94a (Smith Testimony)].

> Especially where, as here, the Legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted] *[Bellotti, supra*, 453 U.S. at 785-786].

As Justice Douglas noted in his dissenting opinion in *United States v. UAW*, 352 U.S. 567, 593 (1957):

> Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during the election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.

The people of this nation are entrusted with the responsibility of judging and evaluating the relative merits of conflicting arguments. It is not the state's responsibility to "protect" the people by prohibiting certain speech:

> [The people] may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. [Footnote omitted] *[Bellotti, supra*, 453 U.S. at 791-792]

The prohibition against corporate independent expenditures under Act 388, without any proof of real or apparent corruption, clearly violates the freedoms secured by the First Amendment, and this Court, therefore, must affirm the decision of the Sixth Circuit.

B. *MCFL* Does Not Compel This Court To Uphold Act 388.

The state's and the amicus parties' arguments rise and fall upon their contention that, because the State Chamber does not satisfy the "three part test" established in *MCFL, supra*, Act 388 is constitutional. In particular, they contend that the State Chamber may be used as an improper conduit by its profit corporation members to make otherwise prohibited independent expenditures.

The fallacy of this position is twofold. First, this Court did not establish a "three-part test" of constitutionality in *MCFL*. Instead, the Court considered three "features" of MCFL which led it to conclude that a prohibition against MCFL's independent expenditures did not serve any compelling state interests. Second, this Court did not hold that independent expenditures by profit corporations may be constitutionally prohibited:

> Our conclusion is that §441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that *organizations* that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace.
>
> *Regardless of whether that concern is adequate to support the application of §441b to commercial enterprises, a question not before us, that justification does not extend uniformly to all corporations.* [Emphasis added] [*MCFL, supra*, 479 U.S. at 263]

In *MCFL, supra*, 479 U.S. at 262, the FEC argued that it was necessary to prohibit corporate independent expenditures in order to prevent nonprofit corporations from being

used as conduits for massive undisclosed spending by profit corporations and unions. This argument was rejected by the plurality in *MCFL, supra*, as well as by Justice 0'Connor in her concurring opinion. *MCFL, supra*, 479 U.S. at 265 (0'Connor, J., concurring). Thus, a majority of the Court agreed that the state's interest in disclosure could be met in a less restrictive manner than absolutely prohibiting direct independent expenditures or by forcing corporations to speak only in a limited fashion through a PAC.

The Sixth Circuit noted that Section 51 of Act 388 provides a reporting mechanism that will prevent the State Chamber from being used as an improper conduit for undisclosed spending. Mich. Comp. Laws Ann. §169.251 (West Supp. 1989); [J.S.App. 25a-26a]. The state argues that Section 51 does not apply to corporations. The state apparently concludes that since Section 51 does not apply, the *only* alternative available is to wholly *prohibit* all independent expenditures by the State Chamber. The fact that the Legislature may not have yet enacted a reporting requirement which applies to the State Chamber cannot justify the state's denial of fundamental First Amendment rights.

The state and amicus also argue, however, that the "*MCFL* limitations" extend not only to undisclosed corporate contributions, but also to corporate independent expenditures. (Appellants' Brief, p. 44) This reference by the state to *MCFL* dealt with the Court's review of past contribution cases such as *NRWC. This case* involves *independent expenditures*—not *contributions*. While disclosure arguably may not be a sufficient safeguard where contributions are involved, a prohibition against independent expenditures requires more rigorous review and must be narrowly tailored to serve the compelling interest in preventing real or apparent corruption.

As discussed above, there is absolutely no evidence—indeed there is contradicting evidence—that real or apparent corruption arises from corporate independent expenditures, whether made by profit or nonprofit corporations. Moreover, other factors will prevent profit corporations from using the State Chamber as a conduit to make massive independent expenditures. If the State Chamber's independent expenditures become excessive, it may be classified as a political organization under I.R.C. § 527(e)(1) and be subjected to all the taxes and regulations applicable to such groups. In addition, I.R.C. § 162(e)(2) and I.R.C. § 527(f) will limit the State Chamber's independent expenditures. Membership dues for nonprofit business leagues are tax deductible to the extent that they are not used for political purposes under I.R.C. § 162(e)(2), and all independent expenditures of any tax exempt entity are subject to taxation under I.R.C. § 527(f). These factors also will deter the State Chamber from making massive independent expenditures in the political marketplace.[7]

Even if the state could show some evidence of corruption, there are certainly less restrictive means to protect the political process than silencing the political speech of nonprofit corporations such as the State Chamber. For instance, the size of corporate independent expenditures may be limited, or through detailed record keeping and reporting requirements, the state could monitor and control the State Chamber's independent spending as well as its receipt and disbursement of corporate membership dues used for political purposes.

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[7] Thirty states currently permit corporate independent expenditures apparently with no corruption of the political process. (Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington.)

Amicus Common Cause argues that less restrictive means will not work because money from membership dues is "fungible". In short, Common Cause is arguing that it would be administratively difficult to regulate the State Chamber's independent expenditures through disclosure. Administrative convenience, however, cannot justify an infringement upon fundamental First Amendment speech. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 102, n.9 (1972).

C. Act 388 Is A Fatally Overbroad And Underbroad Response To The Alleged Threat Of Corruption.

Assuming, for sake of argument, that the state did show some proof of real or apparent corruption, the prohibition against corporate independent expenditures, whether made by a profit or nonprofit corporation, must be overturned under the First Amendment narrow tailoring requirement because Act 388 is a fatally overinclusive and underinclusive response to this alleged evil.[8]

Act 388 is both overbroad and underbroad because it simultaneously prohibits *all* corporations, regardless of their purpose, size, or wealth, from directly speaking on candidates' qualifications while at the same time placing *no* limitations whatsoever on the same speech of other economic entities.

All profit and nonprofit corporations, including charitable corporations, incorporated trade associations, professional

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[8] If the Court affirms the Sixth Circuit on the basis of the narrow tailoring or equal protection analysis, its decision will *not* render the federal statute or any similar state statutes unconstitutional. (Only 11 states have laws treating corporations and labor unions differently. See n. 13, p. 31, *infra*.)

corporations, large multinational corporations, and small closely-held corporations are indiscriminantly prohibited from advocating through independent expenditures—regardless of size, wealth, or influence.

Act 388 does not similarly limit direct advocacy on candidates' qualifications by individuals, unions, business partnerships, limited partnerships, or other unincorporated entities. A closely-held corporation employing 10 workers cannot comment on the qualifications of candidates but a union representing the interests of tens of thousands of auto workers or a partnership employing over 600 workers can speak freely through independent expenditures. The union and the partnership exercise control over large aggregations of capital accumulated in the economic marketplace, but only the corporate entity with much less capital and influence is prohibited from speaking.

In addition, many of these unincorporated entities share the benefits enjoyed by corporations. The state has limited the liability of limited partners in the same manner as corporate shareholders. Mich. Comp. Laws Ann. § 449.1303(a) (West 1989). Limited partners, like corporate shareholders, also have the right to bring derivative actions. Mich. Comp. Laws Ann. § 449.2001 (West 1989). In addition, unions members have limited liability, and a union has the ability to sue and be sued and to hold assets as an independent legal entity. *See generally* Segall, *The Wrong Pocket: Union Liability for Health and Safety Hazards*, 4 Indus. Rel. L.J. 390, 392-393 n.18 (1981) (unions can sue and be sued, hold assets as independent legal entities, and limit the personal liability of their members); 48 Am. Jur. 2d *Labor and Labor Relations* §47 (1979) (modern labor unions approximate corporations in their methods of operation and power). These benefits allow these entities to amass wealth in the economic marketplace for union or business purposes—wealth which the

state allows them to freely use in Michigan's political marketplace. Only corporations, however, are singled out and silenced.

It is impossible for the state to explain how the independent expenditures of a union, a partnership or an unincorporated entity made for business purposes suddenly causes a "deleterious effect" upon the political process if the entity decides to incorporate. There obviously is no factual basis for finding that the potential for corruption or the appearance of corruption arising from independent expenditures differs between a union, a partnership, a wealthy individual, or a corporation.

Thus, not only is Act 388 overbroad in including all corporations, but it is underinclusive as well because it does not include other wealthy, influential economic entities in our society. While a cautious step by step approach may be appropriate where contributions are involved, *NRWC, supra*, 459 U.S. at 209, the First Amendment requires restrictions upon independent expenditures to be *narrowly* tailored under rigorous scrutiny. *NCPAC, supra*, 470 U.S. at 501. The inclusion of all corporations, regardless of their size, wealth, or purpose, and the exclusion of other economic entities, such as unions and partnerships, renders Act 388's prohibition against corporate independent expenditures unconstitutional under the First Amendment.

D. Act 388's Absolute Prohibition Against Corporate Independent Expenditures Does Not Serve The State's Purported Interest In Protecting Shareholders.

The state argues that Act 388 is justified by its interest in protecting shareholders from having their money used to support political candidates to whom they may be opposed. The state again relies solely upon contribution cases such as

NRWC, supra, 459 U.S. at 208. In an independent expenditure case subject to more exacting scrutiny, however, shareholder protection is not a sufficiently compelling state interest.

In *MCFL, supra*, the Court found that shareholder protection was not a compelling state interest:

> Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. . . . Finally, a contributor dissatisfied with how funds are used can simply stop contributing. [*MCFL, supra*, 479 U.S. at 260-261]

This reasoning applies to the State Chamber as well because it is a voluntary membership corporation. Members pay their dues to the State Chamber because they regard the contribution as a more effective means of advocating the interests of business than individual spending. [See J.A. 93a (Smith Testimony)]. They delegate to the State Chamber the authority to use their membership dues in the most effective way to accomplish the objectives of the State Chamber. If a member becomes dissatisfied, it can exercise its rights as a member by electing different directors, seeking an amendment to the bylaws or withdrawing its membership.

This reasoning also applies to shareholders of profit corporations. By investing in corporations, the shareholders authorize the directors to use their investments to effectively accomplish the corporation's business objectives. Elected officials enact legislation and administrative regulations which directly and substantially impact the business community. Thus, the most effective way to serve a corporation's business objectives may include making independent expenditures to express the corporation's views on political candidates. As the state's expert witness recognized:

> [I]ndependent expenditures on the part of a corporation are directly instrumental to the business objectives of the corporation . . . . I mean, they have a very instrumental objective in mind; that is, facilitating the business objectives of the firm. [J.A. 77a (Epstein Testimony)]

Every shareholder investing in a profit corporation realizes that the corporation will undertake a number of specific actions with which the shareholder may disagree. These actions include investment and planning decisions, lobbying decisions, and political speech. *See generally* Prentice, *Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech*, 16 Tulsa L.J. 599, 638-640 (1981). As long as political speech, like investment and planning decisions, serves the corporation's business objectives, shareholder protection cannot justify the prohibition against corporate independent expenditures.

Moreover, few shareholders would be greatly inconvenienced if, because they disagreed with a corporation's business decision, they choose to withdraw their interest and reinvest their money elsewhere. Nonetheless, there are ample means for a member in the State Chamber or a shareholder in a profit corporation to challenge a corporation's business decisions short of withdrawing his or her member-

ship or investment.[9] As noted in *Bellotti, supra*. 435 U.S. at 794-795:

> Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

Thus, shareholder protection is not sufficiently compelling to justify the total prohibition against corporate independent expenditures.

Assuming *arguendo* that shareholder protection is a compelling state interest, Act 388 is unconstitutional because it is not narrowly tailored to serve that interest. Act 388 prohibits *all* corporations from making independent expenditures but does not prohibit labor unions, limited partnerships, trusts, or other entities from making independent expenditures.

In *Bellotti, supra*, 435 U.S. at 793-795, without considering whether the interest was indeed compelling, the Court found that where independent expenditures are involved the interest in shareholder protection did not survive strict scrutiny because the statute was not narrowly tailored to serve that interest.

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[9] The state and amicus argue that members cannot simply withdraw from the State Chamber because they would lose their group insurance. The insurance programs are not a significant part of the State Chamber's functions. In fact, if a business league mainly directs its activities to providing services and benefits to members, it is not tax-exempt under I.R.C. § 501(c)(6).

First, the statute in *Bellotti, supra*, 435 U.S. at 793, singled out banks and business corporations and excluded entities such as unions and trusts. The Court noted that the interests of participants in these entities with respect to institutional speech were comparable to those of minority shareholders in a corporation. The exclusion of these entities undermined the state's purported concern for shareholders and rendered the statute unconstitutional because it was underinclusive and not narrowly tailored to serve the interest in shareholder protection. *Bellotti, supra*, 435 U.S. at 793.

Second, the statute in *Bellotti, supra*, like Act 388 in this case, applied to all corporations, even if the shareholders unanimously authorized an "independent expenditure." Thus, the legislation was unconstitutionally overinclusive and not narrowly tailored to serve the interest in shareholder protection. *Bellotti, supra*, 435 U.S. at 794.

Act 388 singles out corporations and excludes such entities as unions and limited partnerships. Limited partners invest in limited partnerships in a manner very similar to shareholders. Indeed, in order to maintain their status as limited partners, limited partners cannot be actively involved in the management of the partnership. Mich. Comp. Laws Ann. §449.1303 (West 1989). The state is not concerned, however, in protecting the investment of a limited partner from being used for political purposes. The same concern is lacking for union members. In discussing past *contribution* cases, this Court noted in *MCFL, supra*, 479 U.S. at 260:

> But such persons, as noted contribute . . . union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend upon the organization . . . for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving . . . the union.

Act 388's exclusion of unions and limited partnerships undermines the state's purported concern for shareholders and renders the prohibition against corporate independent expenditures unconstitutional because of its underinclusiveness. *Bellotti, supra.*

Act 388 also applies to all corporations even if all the shareholders consent to the independent expenditures. Thus, Act 388, like the statute in *Bellotti,* is both underinclusive and overinclusive and is not narrowly tailored to serve the state's purported interest in shareholder protection.

E. The Availability Of PACs Does Not Compensate For Or Justify The Wholesale Prohibition Of Corporate Independent Expenditures.

The state argues that Act 388 does not violate the First Amendment because the State Chamber can participate in the political process through a PAC. This Court conclusively rejected this argument in *MCFL, supra,* 479 U.S. at 255, by finding that PACs are not a constitutionally adequate substitute for direct independent expenditures.

Simply because it was incorporated, MCFL, like the State Chamber, was required to establish a PAC if it wanted "to engage in any independent spending whatsoever." *MCFL, supra,* 479 U.S. at 253. The Court noted:

> [The] MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore,

> such duties require a far more complex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech . . . .
>
> Thus, while §441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. *The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize §441b as an infringement on First Amendment activities.* [Emphasis added] *[MCFL, supra,* 479 U.S. at 254-255]

An examination of the nature of PACs and the record in this case demonstrates that the PAC system does not render Act 388 constitutional under the First Amendment.

Section 55 of Act 388 allows corporations to establish and administer PACs. Mich. Comp. Laws Ann. §169.255 (West Supp. 1989). A corporation can direct the corporate PAC to make contributions and expenditures on behalf of candidate committees, ballot question committees, political party committees, and independent committees. The PAC can only use money solicited from shareholders,[10] directors and officers, or managerial employees to make these contributions and expenditures. It cannot use corporate treasury funds to make contributions and expenditures.

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[10] A membership corporation may solicit PAC contributions from individual members; or shareholders, officers, directors or policy making, managerial, professional, supervisory, or administrative employees of corporate members. Mich. Comp. Laws Ann. §169.255(3) (West Supp. 1989).

The PAC system interferes with a corporation's ability to speak effectively, or perhaps even to speak at all. Not all corporations can form PACs. In fact, those corporations which are least able to form PACs are also least able, under the state's reasoning, to cause real or apparent corruption because they have less capital and influence.

The efficacy of corporate PACs is limited by several factors. PACs are expensive. It costs between 25% and 50% of the amount spent by a PAC to establish and maintain a PAC. [J.A. 103a, 108a (Mayberry Testimony)]. Small and medium size corporations do not have the resources needed to pay this expense. [J.A. 92a (Smith Testimony), 109a (Mayberry Testimony)]. Thus, the small and medium size corporations that constitute the majority of the State Chamber members, and that do not have the capital or influence discussed by the state, also do not have the ability to speak on candidate qualifications through their own PACs.

In addition, because PACs cannot use corporate treasury funds and because they can solicit contributions only from a limited group of people, the ability of any corporation to speak through a PAC is dependent upon its ability to be a good fund raiser. [J A. 129a-130a (Barrett Testimony), 150a (LaBrant Testimony)]. Smaller corporations with fewer stockholders, directors and officers, and managerial employees may not be able to raise a sufficient amount of money for a PAC. These smaller corporations, therefore, are effectively prohibited from speaking in the electoral process.

While a shareholder of a small corporation may join with shareholders of other corporations to contribute to a PAC, such as the State Chamber's PAC, this is not an effective replacement for direct speech by the small corporation itself. For example, Mr. Smith, the sole shareholder of the W.S. Smith Company, who testified at trial, contributes to the State Chamber PAC so that the voice of business may be

represented in state electoral politics. The State Chamber PAC, however, does not advocate the interests of the W.S. Smith Company in local elections which have a direct impact on the W.S. Smith Company. [J.A. 93a-94a (Smith Testimony)].

PACs also have a poor public image: the public views PACs with suspicion [J.A 92a (Smith Testimony), 104a, 108a (Mayberry Testimony), 133a (Barrett Testimony), 153a (LaBrant Testimony)]; and PACs are cumbersome because of the complex regulatory requirements and expenses related to their establishment and administration. [J.A. 104a (Mayberry Testimony)]. These factors deter some corporations from forming PACs to speak on electoral politics [J.A. 92a (Smith Testimony)].

Thus, the PAC system cannot compensate for or justify the prohibition against direct corporate advocacy through independent expenditures. Instead, the PAC system further accentuates the overbreadth of Act 388 by preventing less wealthy and influential corporations—even small or marginal corporations—from participating in the electoral process either directly *or* indirectly.

In arguing that Act 388 is constitutional, the state notes at length the success of the State Chamber PAC.[11] The Court noted in *MCFL*, however:

> While the burden on the MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we

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(11) This action was brought on behalf of the State Chamber and its members. The State Chamber also can challenge Act 388 because it threatens the First Amendment rights of others. *See Board of Airport Commissioners of Los Angeles v. Jews For Jesus, Inc.*, 482 U.S. 569 (1987). Thus, the success of the State Chamber PAC does not make Act 388 constitutional.

> do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution. [*MCFL*, *supra*, 479 U.S. at 263]

In *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988), the Court also rejected this argument:

> Appellants argue that even if the statute imposes some limitations on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees . . .
>
> That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression . . . The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing. [Citations omitted]

Thus, because the State Chamber may have made the best of an infringement on constitutionally protected speech does not, and cannot, render the infringement constitutional.

Moreover, the availability of the PAC system for corporations is subject to the whim of the Michigan Legislature. Just recently, President Bush proposed to abolish corporate and union PACs at the federal level. If the Michigan Legislature decided tomorrow to strike Section 55 from Act 388, the State Chamber and all other corporations will have absolutely no chance to express their views to the general public—while at the same time unions will remain free to

speak in the most direct and most economical fashion through independent expenditures.

The fact remains that, even with the present allowance of corporate PACs, Act 388's prohibition against corporate independent expenditures for advocacy restricts the amount, content, and method of constitutionally protected speech without any constitutionally adequate justification.

II. ACT 388'S DISPARATE TREATMENT OF NONMEDIA CORPORATIONS VIOLATES THE EQUAL PROTECTION CLAUSE.

Act 388's disparate treatment of nonmedia corporations with respect to unions, media corporations and other unincorporated entities violates the Equal Protection Clause of the Fourteenth Amendment. Therefore, if this Court should reverse the Sixth Circuit under the First Amendment issue, it should nonetheless hold Act 388's prohibition against corporate independent expenditures unconstitutional under the Fourteenth Amendment.[12] Such a ruling will not affect the federal statute or a majority of the state statutes because only 11 states do not prohibit union political speech while prohibiting the political speech of corporations.[13]

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[12] This Court may consider the Equal Protection challenge because it is supported by the law and the record and it will not expand the relief granted by the Sixth Circuit. S. Ct. R. 10.5. [See Complaint, J.A. 9a-11a]

[13] Iowa Code Ann. §56.29 (West Supp. 1989) (Iowa); Ky. Rev. Stat. §121.025 (Michie Supp. 1988) (Kentucky); Mass. Gen. Laws Ann. ch. 55, §8 (West Supp. 1989) (Massachusetts); Mich. Comp. Laws Ann. §169.254 (West Supp. 1989) (Michigan); Minn. Stat. Ann. 211B.15 (Supp. 1989) (Minnesota); Mont. Code Ann. §13-35-227 (1987) (Montana); Ohio Rev. Code Ann. §3599.03 (Page 1988) (Ohio); Okla. Stat. Ann tit. 74, §4219 (West Supp. 1989) (Oklahoma); Tenn. Code Ann. §2-19-132 (1985) (Tennessee); W. Va. Code §§ 3-8-8 to 3-8-13 (1987) (West Virginia); Wis. Stat. Ann. §11.38 (West 1986 & Supp. 1988) (Wisconsin).

A. Act 388 Improperly Discriminates Between Nonmedia Corporations And Labor Unions And Other Unincorporated Entities.

Corporations are entitled to the equal protection of the laws under the Fourteenth Amendment. *See e.g. Gulf, Colorado & Santa Fe Railway Co. v. Ellis,* 165 U.S. 150, 154 (1897). Act 388's prohibition against corporate independent expenditures is subject to strict scrutiny under the Fourteenth Amendment because it burdens the exercise of the fundamental First Amendment right of freedom of speech. [J.S. App. 70a-71a]. *See Carey v. Brown,* 447 U.S. 455 (1980); *Bellotti, supra,* 435 U.S. at 785-786; *Buckley, supra,* 424 U.S. at 14; *Police Department of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). Strict scrutiny requires distinctions drawn by the government to be precisely tailored to serve a compelling state interest. *See e.g. Plyler v. Doe,* 457 U.S. 202, 216-217 (1982); *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972).

The compelling interest analysis under the First Amendment is not applicable to the strict scrutiny analysis under the Equal Protection Clause. Even if a restriction on speech is justified by a compelling state interest, the restriction cannot burden some groups more than others without a demonstration that such disparate treatment serves a compelling interest and that the restriction has been narrowly tailored to reduce, to the greatest degree possible, the incidence of the disparate treatment.

In *Mosley, supra,* this Court held that a Chicago ordinance prohibiting picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, violated the Equal Protection Clause of the Fourteenth Amendment:

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, *under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. Cf. Tinker v. Des Moines School District,* 393 U.S. 503, 511 (1969); *Wirta v. Alameda-Contra Costa Transit District,* 68 Cal. 2d 51, 434 P. 2d 982 (1967). If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful [*Mosley, supra,* 408 U.S. at 100]
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> * * *
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> *The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. Williams v. Rhodes,* 393 U.S. 23 (1968); see generally *Dunn v. Blumstein,* 405 U.S., at 342-343. Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. *Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing.* Such excesses 'can be controlled by narrowly drawn statutes,' *Saia v. New York,* 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter. [Emphasis added] [Footnote omitted] [*Id.* 408 U.S. at 101-102]

Michigan allows unions, partnerships and other unincorporated entities to make independent expenditures. Therefore, the state cannot prohibit corporate independent expenditures unless it can demonstrate that independent expenditures by any type of corporation are *clearly* more harmful than the independent expenditures of unions, partnerships, and other unincorporated entities. Specifically, be-

cause preventing real or apparent corruption is the only legitimate compelling state interest for restricting independent expenditures, the state must demonstrate that corporate independent expenditures clearly lead to *more* real or apparent corruption than the independent expenditures of unions, partnerships and other unincorporated entities. *NCPAC, supra,* 470 U.S. at 496-497.[14]

The state cites *MCFL, supra,* 479 U.S. at 258-259 n.11, in claiming that Act 388 does not violate the Equal Protection Clause. In that footnote in *MCFL,* the Court cited *NRWC.* Neither *MCFL* nor *NRWC* involved an equal protection challenge to the legislation in question. Moreover, *NRWC* and *MCFL* do not support the conclusion that corporations differ from other economic entities such as unions with respect to their role in the electoral process. Indeed, these decisions are part of a large body of federal statutory and decisional precedent supporting analogous treatment of both corporations and labor unions with regard to campaign finance law.

Federal campaign finance laws have subjected labor unions to basically the same restrictions as corporations since the 1940's. *See United States v. CIO,* 335 U.S. 106, 114-116 (1948). *See also* 2 U.S.C.S. §441a-c (1980). This Court's recognition of the close similarities between unions and corporations goes back at least as far as *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 385 (1922), in which Chief Justice Taft stated that "in every way the union acts as a business entity, distinct from its members. No orga-

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[14] Shareholder protection, the only other justification offered by the state, is not sufficiently compelling where independent expenditures are involved. See Section I(D) *supra.* Act 388's failure to protect union members, limited partners, and others violates the Equal Protection Clause. The state cannot prove that these individuals are subject to any less harm than corporate shareholders if the organization in which they have invested money makes an independent expenditure.

nized corporation has greater unity of action, and in none is more power centered in the governing executive bodies."

The assumption that corporate independent expenditures are associated with more real or apparent corruption than the independent expenditures of noncorporate entities is also not supported by common sense. "Big labor" is as powerful [J.A. 100a (Mayberry Testimony)] and, therefore, just as capable of corruption as big corporations (and certainly more so than small corporations). In fact, with developments such as union representation on corporate boards, it is fair to state that big labor probably has more in common today with large corporations than large corporations have in common with small corporations.

Whether or not disparate treatment between corporations and unincorporated entities could have withstood strict scrutiny 73 years ago when Michigan's 1913 Corrupt Practices Act was enacted is irrelevant to determining whether this disparate treatment withstands strict scrutiny today. This is especially true because unincorporated entities, particularly unions, have increased their power and influence tremendously during this century. Indeed, the increased power of labor unions is a major reason why federal election law was amended to treat corporations and labor unions similarly. *See United States v. UAW,* 352 U.S. 567, 578-583 (1957). Distinctions which may have existed between corporations and unions in the past simply do not exist in the 1980's—and have not existed for many decades.

The state has never presented any evidence showing that corporate independent expenditures lead to either corruption or the appearance of corruption. Consequently, the state has never shown that corporate independent expenditures are more harmful than those of unions, partnerships or other unincorporated entities Further, as discussed extensively *supra,* even if the state had presented some evidence of corpo-

rate corruption, it has never, nor can it ever, present evidence that independent expenditures by unions, partnerships, or other unincorporated entities cause any less real or apparent corruption.

The state cannot explain why incorporated entities, including incorporated labor unions, are denied an opportunity to express their political views through independent expenditures while unincorporated entities, including unincorporated labor unions, are not. *Mosley, supra.* The existence of some incorporated Michigan labor unions highlights the weakness of the state's position because independent expenditures by the United Auto Workers ("UAW") will not suddenly create real or apparent corruption if the UAW decides to incorporate. The same is true of the independent expenditures of a partnership or a sole proprietorship which decides to incorporate.

The reason that Act 388's disparate treatment of corporations is subject to strict scrutiny must not be forgotten; Act 388 threatens the fundamental right of free speech. In *Bellotti, supra,* 435 U.S. at 784-786, the Supreme Court discussed the dangers created by restricting speech:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) . . . . Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [Footnote omitted]

The potential impact of skewed independent expenditure prohibitions on civil and political rights is not difficult to comprehend. Granting labor unions an advantage in communicating with the voting public while silencing corporations may well change political decisions made at the ballot box. Candidates are chosen because of their positions on issues discussed during the campaigns. Unions and corporations often line up on opposite sides of issues, such as workers compensation laws, wage and hour laws, etc. Thus, if unions are allowed to speak but corporations are not, decisions made by citizens who are not fully informed on all issues surrounding political candidates can alter the very structure of our government and affect virtually all civil and political rights. Act 388's disparate treatment of corporations, unions, and other unincorporated entities, therefore, must be held unconstitutional under the Equal Protection Clause.

B. Act 388 Improperly Discriminates Between Media and Nonmedia Corporations.

Section 6(3)(d) of Act 388 provides the following *exclusion* from the definition of expenditure:

> An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting. [Mich. Comp. Laws Ann. §169.206(3)(d)(West Supp. 1989)]

This exclusion violates the Equal Protection Clause by impermissibly denying certain corporations (nonmedia corporations) the right to make independent expenditures while allowing other corporations (media corporations) the same right. The Trial Court, however, improperly concluded that no distinction was created between "media" and "nonmedia" corporations:

> Section 6(3)(d) makes no distinction between media and

non-media corporations. Any corporation, whether termed a 'media' corporation or a 'non-media' corporation, may avail itself of the exemption from section 54(1) provided by section 6(3)(d). *Cf. United States* v *CIO*, 335 U.S. 106 (1948). Therefore, plaintiff's second claim under the equal protection clause must fail. [Footnote omitted] [J.S.App. 73a]

Section 6(3)(b) of Act 388 already allows expenditures for internal communications. Mich. Comp. Laws Ann. §169.206(3)(b) (West Supp. 1989); [J.S.App. 92a]. Reading Section 6(3)(d) as permitting internal communications through media instruments, therefore, renders it redundant and meaningless. Further, it is clear that the office of the Michigan Secretary of State, which implements and enforces Act 388, allows media corporations such as the corporation owning the *Grand Rapids Press* to communicate with the general public [*See* J.A. 57a], but does not allow nonmedia corporations such as the State Chamber to do so.

Thus, Act 388 discriminates between media corporations (i.e., corporations which own media institutions) and nonmedia corporations. Media corporations may make independent expenditures to communicate with the general public while nonmedia corporations are only allowed to use independent expenditures to communicate with their members.

Under the strict scrutiny test the disparate treatment of nonmedia corporations and media corporations must be precisely tailored to serve a compelling state interest—specifically, to prevent corruption or the appearance of corruption. It is clearly untenable to argue that media corporations are less prone to corruption than other corporations. The views of politicians on certain issues such as taxes, rape shield laws and libel/slander laws affect the media. Media endorsements, therefore, may very likely be influenced by business factors. Compare the Grand Rapids Press' editorial [J.A. 57a] with the State Chamber's proposed endorsement of the same candidate [J.A. 60a]. Why should one endorsement made for business purposes be lawful and the other, also made for business purposes, be a felony?

The only apparent legislative justification for allowing one group of corporations (media corporations) the right to make independent expenditures to communicate with the general public while denying another group of corporations (nonmedia corporations) the same right is that a special First Amendment status applies to media corporations. This distinction, however, is simply not supported by constitutional law.

This Court has repeatedly rejected the notion that the institutional media is entitled to greater rights under the First Amendment than other institutions or individuals. *Bellotti, supra*, 435 U.S. at 782 (the organized press has a monopoly on neither the First Amendment nor the ability to enlighten); *Pell v Procunier*, 417 U.S. 817, 833-834 (1974) (the press has no independent First Amendment right of access to prisons); *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) (the informative function served by the organizational press is also served by others). Clearly the constitution does not accord *special* treatment to media corporations under the First Amendment.

To the extent that Act 388's media exception reflects the desire of the Michigan Legislature to continue to allow political endorsements by media corporations, this exception constitutes an example of the most dangerous form of restriction on the voters' right to know. In *Bellotti, supra*, 435 U.S. 782, n.18, the Court noted:

> If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same

communication by appellants, the result would not be responsive to the informational purpose of the First Amendment. Certainly, there are voters in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new businesses into the state and to prevent established businesses from leaving, who would be interested in hearing appellants views on graduated tax as the views of media corporations that might be less knowledgeable on the subject.

The same reasoning applies to candidate elections. Candidates are not elected in a vacuum The debates on the qualifications of candidates for political office necessarily involve debates on the issues they support and oppose. Nonmedia corporations may be in a better position to express their views on the candidates and the issues supported and opposed by the candidates than the media. Indeed, nonmedia corporations may be able to force candidates to address issues of concern to the business community and, thus, the citizens of the state, that the media would want to avoid because of its own potentially conflicting business interests. Democratic government clearly is in peril when those in power are allowed to choose who will be allowed to exercise political speech and the form that such speech will be allowed to take.

The state has failed to either articulate or offer any proof or any proper rationale for the media exception. The unjustified disparate treatment between media and nonmedia corporations is another example of Act 388's failure to meet the narrow tailoring requirement of the strict scrutiny test, and is further evidence of why this Court should declare Act 388's prohibition against corporate independent expenditures unconstitutional under the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, Act 388's prohibition against corporate independent expenditures violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Appellee Michigan State Chamber of Commerce therefore requests this Honorable Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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No. 88-1569

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

RICHARD H. AUSTIN,
Michigan Secretary of State,
and FRANK J. KELLEY,
Michigan Attorney General,

Appellants,

v.

MICHIGAN STATE CHAMBER OF
COMMERCE, a non-profit Michigan
Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I.

THIS CASE IS GOVERNED BY FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE, INC.

The cornerstone issue to be resolved in this case is whether the Court of Appeals erred in striking down Mich. Comp. Laws Ann. ("MCL") § 169.254(1) (West 1989 Supp.), on the basis of this Court's holding in Federal Election Commission v. Massachusetts Citizens for Life, Inc., ("MCFL"), 479 U.S. 238 (1986). The State Chamber's Brief strives to disregard MCFL and primarily relies on the holding in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), involving a complete prohibition against corporate expenditures and contributions in connection with state

referenda.[1] Of course, in Bellotti, the Court "did not consider the validity of laws, like [2 U.S.C.] § 441b, aimed at the threat of corruption in candidate elections." MCFL, 479 U.S. at 270, n. 2 (Rehnquist, C. J., dissenting). (Emphasis in original.) The Court recognized, however, that in candidate elections, unlike referendum votes concerning general public interest issues, there well may be a threat "of real or apparent corruption in independent expenditures by corporations to influence elections." Bellotti, 435 U.S. at 788, n. 26.

These concerns acknowledged in Bellotti are fully consistent with the

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1 See Brief of Appellee at 8, 9, 15, 24-26, and 36.

concerns expressed in MCFL regarding independent expenditures by corporations. While the Court created a narrow exception to the general principle permitting state regulation of corporate political activity, the Court reaffirmed two compelling interests served by the regulation of corporate electoral activity; curbing the use in elections of "the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization,'" 479 U.S. at 257, quoting Federal Election Comm'n v. National Right to Work Committee, ("NRWC"), 459 U.S. 197, 207 (1982), and "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." MCFL, 479 U.S. at 260.

These compelling interests apply to the State Chamber, a non-profit, multi-purpose, conduit corporation, for the reason that it more closely resembles the type of "'traditional corporatio[n] organized for economic gain'. . .that has been the focus of regulation of corporate political activity." MCFL, 479 U.S. at 259, quoting Federal Election Commission v. National Conservative Political Action Committee, ("NCPAC"), 470 U.S. 480, 500 (1985). Because the State Chamber is a "conduit for the type of direct spending that creates a threat to the political marketplace", MCFL, 479 U.S. at 264, it, therefore, poses "a threat of the danger that has prompted regulation." MCFL, 479 U.S. at 263.

Furthermore, the exception for non-profit ideological corporations which

this Court fashioned in MCFL is clearly not applicable to the State Chamber. Indeed, the State Chamber's Brief does not even pretend to claim that it possesses the three characteristics or features of MCFL which this Court found "essential to our holding." MCFL, 479 U.S. at 263. Of course, it would be an exercise in futility because: 1) In contrast to MCFL, the State Chamber has economic resources which are unrelated to its political support; 2) It has significant business purposes which create disincentives for its members to disassociate themselves even if they disagree with the State Chamber's political activities, and; 3) The State Chamber accepts corporate money from its 6,000 corporate members in the form of dues. Thus,

unlike MCFL, the State Chamber and other incorporated non-profit conduits have the ability to act as conduits for profit-making corporations and circumvent the basic prohibition on corporate spending. In contrast to MCFL, the State Chamber is not entitled to an "unfair advantage in the political marketplace". MCFL, 479 U.S. at 257.

The State Chamber is not an ideological advocacy corporation in the mold of MCFL. The Court of Appeals erred in declaring Section 54(1) unconstitutional pursuant to the holding in MCFL.

II.

SECTION 54(1) IS NOT SUBSTANTIALLY OVERBROAD.

The State Chamber and its amici argue that even if Section 54(1) is constitutional as applied to the State Chamber, the Court should strike down the statute as overbroad.[2] Since the Court below did not address this issue, it should be addressed, if at all, only on remand. See Board of Trustees of State University of New York v. Fox, 109 S. Ct. 3028 (1989) (remanding to Court of Appeals for determination of overbreadth challenge to state statute).

In any case, the State Chamber's overbreadth challenge is meritless. As

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2 See Brief of Appellee at 19-21.

this Court has made clear, "[t]he overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 2234 (1988), quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).[3] When considering an overbreadth challenge, this Court has held that "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state

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3 Moreover, overbreadth analysis is an exception to traditional rules of standing and ripeness which require that the party before the court be actually injured in a way that entitles the party to relief. See Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) ("under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws").

regulatory program." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

In Broadrick v. Oklahoma, supra, the Court specifically addressed the applicability of the overbreadth doctrine to regulations designed to prevent political corruption and the appearance of corruption. In such a situation, the statute is only unconstitutional if it is "substantially overbroad" when "judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. In MCFL, 479 U.S. at 257, the Court left no doubt that a state may regulate "the corrosive influence of concentrated corporate wealth" on the political system by limiting corporate independent

expenditures.[4]

Therefore, whatever overbreadth may exist in Section 54(1) "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied," Broadrick v. Oklahoma, 413 U.S. at 615-616, rather than through an overbreadth challenge by a party whose conduct is within the "hard core" of what the statute may lawfully proscribe. Id. at 608.

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4 Notably, the Court in MCFL did not find overbroad § 441b of the Federal Election Campaign Act, which is in its essentials identical to the Michigan statute.

III.

SECTION 54(1) OF THE CAMPAIGN ACT IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Section 54(1), Which Distinguishes Between Corporate Entities and Noncorporate Entities, Does Not Deny The State Chamber Equal Protection Of The Law.

The State Chamber and various amici advance the erroneous argument that Section 54(1) of the Campaign Act denies them equal protection of the law because corporations are subject to the prohibition from making independent expenditures in candidate elections while labor unions are not subject to the ban.[5] Since Appellants did not raise this issue in

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5 See Brief of Appellee at 31-40.

both their brief on the merits and jurisdictional statement, and since the Sixth Circuit did not address it, it is not properly before this Court. Sup. Ct. R. 34.1(a). See R. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE 363-368 (6th ed. 1986).

Nevertheless, the State Chamber's claim is without merit because it attempts to set up a false dichotomy. Section 54(1) does not distinguish between corporations and labor organizations. The District Court found that Section 54(1) only "distinguishes between corporations and non-corporate persons or entities. [It]. . .does not distinguish between corporations and labor unions." (J. S. App. 71a.) Any organization such as a business trust, partnership or labor

organization, which chooses to adopt the corporate form is subject to the same restrictions that are placed on all corporations, including the State Chamber.[6] (J. A. 178a-184a.) Conversely, any unincorporated organization which chooses the non-corporate form is not subject to the restriction.

Moreover, there is nothing in constitutional jurisprudence which requires

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6 The Michigan Education Association, an incorporated labor union, is subject to the same restrictions on independent expenditures as the State Chamber. Conversely, the UAW, an unincorporated labor union, is not. However, the UAW and all other unincorporated unions which are not covered by Section 54(1) are subject to significant constitutional restrictions on their ability to use their funds for political purposes in contravention of the wishes of their dissenting members. See Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

that unequals be treated equally, or even that they be dealt with simultaneously, and legislative judgments in that regard are entitled to great deference:

> While business corporations may not represent the only organizations that pose [a] danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the 'careful legislative adjustment of the federal electoral laws, in a "cautious advance, step by step,"' to which we have said we owe considerable deference. (Citations omitted).
> MCFL, 479 U.S. at 258-259, n. 11.

In California Medical Association v. Federal Election Commission, 453 U.S. 182, 201 (1981), this Court accepted the "judgment by Congress that. . .entities

hav[ing] different structures and purposes. . .may require different forms of regulation in order to protect the integrity of the electoral process." See also NRWC, 459 U.S. at 210.

The statute at issue, Section 54(1), places a complete ban on independent expenditures by all corporations. The statutory provision does not differentiate between non-profit and for-profit corporations, nor between ideological and commercial corporations. Since the statute treats all corporations in a like manner, Section 54(1) does not invidiously discriminate against any group.

The legislative history of Section 54(1) demonstrates that the Legislature had a compelling interest in limiting the

political contributions and expenditures by corporations. The first legislative effort in this area was the enactment of the Corrupt Practices Act.[7] Section 14 of the Act, which banned the use of corporate funds for the payment of election expenses, stated:

> No officer, director, stockholder, attorney, agent or any other person, acting for any corporation or joint stock company, whether incorporated under the laws of this or any other state or any foreign country, except corporations formed for political purposes, shall pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation to any candidate or to any political committee for the payment of any election expenses whatever.

The purpose of such a ban was noted by the Michigan Supreme Court in People

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7 1913 Mich. Pub. Acts 109.

v. Gansley, 191 Mich. 357, 376; 158 N.W. 195, 201 (1916):

> It is probable that the legislature had in mind the fact that it is a matter of history that corporations have in many instances used their funds (acting through and by their officers) to influence elections, and that body believed that such practice was an abuse and menace to good government, which it sought to remedy by this legislation. The record, in our opinion, is a justification for the legislation complained of.
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> It was for the legislature to say, in the exercise of the police power, whether such use of corporate funds opened the door to corruption and tended to destroy safeguards sought to be placed around elections to 'protect the purity of the ballot.' . . .

More than sixty years later, the Michigan Supreme Court reaffirmed those governmental interests, concluding:

> The legislative intent in prohibiting financial involvement of corporations in the elective process was to pre-

vent the use of corporate funds to impose undue influence upon elections. Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.

> Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 492; 242 N.W.2d 3, 13 (1976) (Footnote omitted).

The Legislature has long considered large-scale election activity by corporations to pose special problems. The Legislature concluded that corporations' aggregations of wealth presented such disruptive power and influence in connection with state candidate elections that prohibitions on contributions, expen-

ditures and independent expenditures were justified.[8] The statutory ban "reflects a legislative judgement that the special characteristics of the corporate structure require particularly careful regulation", NRWC, 459 U.S. at 209-210.

In its efforts to reform the political process by imposing tightly drawn restrictions on corporations, the Legislature has not committed constitutional error by not treating individuals or other organizations differently. Indeed, the Legislature might well have concluded that all organizations pose

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[8]Similarly, the laws of a least twenty states prohibit both contributions and expenditures by corporations in support of candidates in state elections. See Jurisdictional Statement of Appellants at 16, n. 13.

such a similar threat of abuse that they should all fall within the same restrictions as corporations. The Legislature, however, did not. The Constitution does not require that the Legislature treat corporate entities and non-corporate entities in the same manner. See MCFL, 479 U.S. at 258-259, n. 11.

B. The Campaign Act's Media Exemption, MCL § 169.206(3)(d), Does Not Deny The State Chamber Equal Protection Of The Law.

Finally, the exemption for media corporations is not violative of equal protection. MCL § 169.206(3)(d) exempts from the reach of the statute:

> An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or in opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting.

In MCFL, 479 U.S. at 250, the Court examined 2 U.S.C. § 431(9)(B)(i), the federal counterpart of MCL §169.206(3)(d), and noted that the corporate media exemption was designed to:

> 'make it plain that it was not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.' H.R. Rep. No. 93-1239, p. 4 (1974).

Similarly, in Buckley v. Valeo, 424 U.S. 1, 93 n. 127 (1976), the Court noted that special protections for the news media, like § 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media. . . and preferential postal rates and antitrust exemptions for newspapers.

See also FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

Thus, despite the State Chamber's assertions to the contrary, MCL § 169.206(3)(d) only recognizes the First Amendment right of the media to freely publish "any news story, commentary, or editorial".

In FEC v. Phillips Publishing Co, 517 F. Supp. 1308, 1313 (D. D.C., 1981), the Court examined 2 U.S.C. § 431(9)(B)(i), and gave no indication that it discriminated arbitrarily and unreasonably against nonmedia corporations in violation of the First and Fifth Amendments. Likewise, in Reader's Digest Association v. FEC, 509 F. Supp. 1210 (S.D., N.Y.,

1981), the Court concluded that dissemination of a tape for the purposes of publicizing the magazine would fall within the press entity's legitimate function, and would be covered by the media exemption. Again, no indication was given that the corporate media exemption was unconstitutional. In fact, the Courts have never held that a statute which treats some press activities differently than non-press activities is a violation of equal protection.

It was undoubtedly for the foregoing reasons that the en banc 11th Circuit unanimously rejected the similar argument that "the provisions of 2 U.S.C. § 441b(a), together with the provisions of 2 U.S.C. § 431(9)(B)(i), discriminate arbitrarily and unreasonably in violation

of the First and Fifth Amendments between corporations engaged in businesses other than publication of newspapers and magazines, on the one hand, and corporations engaged in the publication of newspapers and magazines, on the other". Athens Lumber Co v. FEC, 689 F.2d 1006, 1016 (11th Cir. 1982) (certifying issues to the Eleventh Circuit Court of Appeals en banc), 718 F.2d 363 (11th Cir. 1983) (en banc) (answering certified questions in the negative), cert den, 465 U.S. 1092 (1984).

Like the Eleventh Circuit, this Court should conclude that, far from an unconstitutional discrimination between similar entities, the Campaign Act's media exemption is a proper legislative effort to accomplish the important

governmental interests served by the Act without unduly burdening the media in its coverage of state election campaigns.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals that MCL § 169.254(1) is unconstitutional as applied to the Michigan State Chamber of Commerce should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
APPELLANTS,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation, APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE FEDERAL ELECTION COMMISSION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1569

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General, APPELLANTS,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation, APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE FEDERAL ELECTION COMMISSION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Federal Election Commission ("FEC" or "the Commission") is the independent agency established by Congress to administer and "formulate policy with respect to" the Federal Election Campaign Act of 1971, as amended (the "FECA"), *codified* at 2 U.S.C. §§ 431-455. *See* 2 U.S.C. § 437c(b)(1).[1] The Com-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Elec-

mission is vested with "exclusive jurisdiction" over the administration and civil enforcement of the FECA. 2 U.S.C. § 437c(b)(1). The Commission also promulgates regulations, 2 U.S.C. § 437d(a)(8), and issues advisory opinions applying the FECA to proposed transactions or activities. 2 U.S.C. § 437d (a)(7). The Commission is authorized to appear in litigation regarding the administration and enforcement of the FECA, as well as the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. *See* 2 U.S.C. § 437d (a)(6); 26 U.S.C. §§ 9010, 9040. This brief is submitted in support of the Appellants pursuant to Supreme Court Rule 36.4.

The FECA generally prohibits any corporation from using its corporate treasury funds to make "a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a). However, the FECA permits a corporation to use its corporate treasury funds to administer a separate segregated fund to be used for political purposes. 2 U.S.C. § 441b(b)(2)(C). Separate segregated funds are defined as political committees by the FECA, 2 U.S.C. § 431(4)(B), and like other political committees are subject to recordkeeping and reporting requirements.

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tion Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357, and by Pub. L. No. 100-352, Sec. 6(a), 102 Stat. 662, 663 (June 27, 1988).

See 2 U.S.C. §§ 432-434. The corporation itself can direct the making of contributions and expenditures from this fund. *See Pipefitters v. United States*, 407 U.S. 385, 413-426 (1972). Contributions to a separate segregated fund may be solicited only from the corporation's stockholders, executive and administrative personnel and their families, and, if a membership corporation, from members. 2 U.S.C. § 441b(b)(4).

The decision of the court of appeals in this case held that Mich. Comp. Laws ("MCL") § 169.254(1), a provision of the Michigan Campaign Finance Act (the "Michigan Act"), modeled on 2 U.S.C. § 441b, is unconstitutional as applied to independent election expenditures by the Michigan State Chamber of Commerce ("State Chamber").[2] The court reached this decision in reliance upon *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), a case involving 2 U.S.C. § 441b itself. The Commission has a vital interest in this case because the lower court's decision erroneously expands the scope of this Court's ruling on the constitutionality of the FECA, and will adversely impact the Commission's ability to enforce the FECA.

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[2] Section 54(1) of the Michigan Act prohibits a corporation from making, *inter alia*, independent expenditures "in assistance of, or in opposition to the nomination or election of a candidate" for state office. MCL §§ 169.254(1), 169.206(1). However, it permits a corporation to establish a separate segregated fund, MCL § 169.255(1), and solicit contributions to that fund from a restricted class of individuals including its stockholders, officers, directors, managerial and administrative personnel and their spouses, and, if a membership corporation, from the stockholders, officers, directors and managerial personnel of members. MCL §§ 169.255(2), (3). A separate segregated fund under the Michigan Act is required to report as a political committee or independent committee. MCL §§ 169.208(2), 169.211(2).

STATEMENT OF THE CASE

The State Chamber is a nonprofit Michigan corporation established in 1959 to serve the economic interests of the Michigan business community (J.S. App. 2a-3a, 41a).[3] It does this through a number of activities including, *inter alia*, providing business training and education, distributing newsletters and reports, organizing seminars and conventions, encouraging ethical business practices, lobbying, and making contributions and expenditures in political elections (J.S. App. 22a-23a, 41a-42a). More than 75% of the State Chamber's 8,000 members are business corporations (J.S. App. 3a, 41a). It is funded primarily by annual dues which its corporate and noncorporate members are required to pay (J.S. App. 2a-3a).

In June 1985, the State Chamber decided to place a paid advertisement in the *Grand Rapids Press* in support of a candidate in a primary election for the Michigan House of Representatives (J.S. App. 4a, 42a-43a). Although the State Chamber's separate segregated fund, the Michigan State Chamber of Commerce Political Action Committee, had ample funds to pay for the advertisement in compliance with the Michigan Act,[4] the State Chamber decided it wanted to pay for the advertisement with funds from its corporate treasury instead (J.S. App. 6a-7a).

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[3] "J.S. App. ——" references are to the consecutively numbered pages of the Appendix to the Jurisdictional Statement. "J.A. ——" references are to the pages of the Joint Appendix filed by the parties in this Court.

[4] The State Chamber's separate segregated fund projected having more than $140,000 to spend in the 1986 elections (J.A. 143a).

Anticipating that its proposed expenditure would violate the Michigan Act, the State Chamber brought this action seeking a declaration that section 54(1) was unconstitutional and an injunction against its enforcement (J.S. App. 4a, 43a).

The court of appeals concluded that this case was controlled by this Court's holding in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), that the similar federal prohibition of corporate election expenditures could not constitutionally be applied to certain corporations. The holding in *MCFL* was explicitly limited to corporations having three distinctive characteristics possessed by the corporation in that case: 1) it was formed for the express purpose of promoting political ideas and could not engage in business activities, 2) it had no shareholders or persons financially affiliated with it, and 3) it was not established by a business corporation or union and had a firm policy against accepting money from such entities. 479 U.S. 263-264. The court of appeals acknowledged that the State Chamber was formed to promote the interests of the Michigan business community (J.S. App. 22a), and that more than 75% of its treasury consisted of funds received from its business corporation members (J.S. App. 24a-25a). Nevertheless, it decided that the State Chamber was protected by the *MCFL* decision because the Michigan Act's requirements for reporting independent expenditures ensured that the Chamber's election expenditures from the funds provided by its corporate members would not be "undisclosed" (J.S. App. 25a-26a).

Dissenting from the denial of rehearing *en banc* by the court of appeals, Judge Merritt, joined by three other judges (J.S. App. 38a), stated:

> The panel . . . describes the Chamber as "comprised of about eight thousand voluntary members, approximately *seventy-five percent of whom are corporations* . . . ." Thus, the panel itself—without recognizing it—characterized the Michigan Chamber so as to place it outside the narrow exception carved out by the Supreme Court . . . .
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> * * * *
>
> [T]he Michigan Chamber of Commerce may now act as a conduit for large sums of money contributed by its corporate members—General Motors, Ford, Chrysler, etc.—in support of the corporations' favorite candidates.

(J.S. App. 35a-36a, 33a) (emphasis in original).

SUMMARY OF ARGUMENT

Section 54(1) of the Michigan Campaign Finance Act, which was modeled on a provision of the Federal Election Campaign Act, 2 U.S.C. § 441b, requires a corporation to finance independent expenditures in state elections from a separate segregated fund made up of voluntary contributions from individuals. In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), this Court determined that section 441b was unconstitutional as applied to some small, informally organized incorporated advocacy groups that might be discouraged from making election expenditures because of the burdens of forming a separate segregated fund. The Michigan State Chamber of Commerce is not such a corporation, for it is a large, sophisticated organization that has for many years operated a separate segregated fund in compliance with the Michigan statute, which has been a potent force in Michigan elections.

The Court also explicitly limited its decision in *MCFL* to corporations that satisfy a three part test that, the Court said, demonstrates that the important governmental purposes underlying the statute are not applicable to their independent election expenditures. The State Chamber cannot satisfy any of the three parts of this test since election expenditures from the State Chamber's general treasury would be financed primarily by dues from the business corporations that make up the bulk of its membership, the State Chamber is dedicated to serving the business interests of its members rather than merely an ideological agenda, and members of the State Chamber have a strong financial disincentive from ceasing to pay dues even if they do not support the Chamber's election activities. For this reason as well the Michigan statute is not unconstitutional as applied to the State Chamber.

Allowing a corporation to make election expenditures from its general treasury in these circumstances would nullify the important limitations this Court placed on its decision in *FEC v. Massachusetts Citizens for Life*, open an avenue through which virtually unlimited amounts of corporate and union money could be diverted to electoral campaigns, and substantially undermine congressionally mandated limitations upon the use of corporate and union wealth to influence federal elections which have been in effect for more than 40 years.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS THAT THE MICHIGAN ACT IS UNCONSTITUTIONAL AS APPLIED TO THE MICHIGAN STATE CHAMBER OF COMMERCE SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH THIS COURT'S DECISION IN *FEC v. MASSACHUSETTS CITIZENS FOR LIFE*, 479 U.S. 238 (1986)

A. Section 54(1) Of The Michigan Campaign Finance Act Does Not Restrict The State Chamber's Political Speech

Like 2 U.S.C. § 441b, upon which it was modeled, section 54(1) of the Michigan Act prohibits corporations from using their treasury funds to make contributions and expenditures in connection with elections, but permits them to make election expenditures and contributions from a separate segregated fund financed by individual contributions solicited specifically for that purpose. Thus, the statute regulates only how such election expenditures are financed and leaves unrestricted the amount, method and content of a separate segregated fund's expenditures for political expression. For almost all corporations, the opportunity for political speech provided by this statutory scheme fully satisfies the requirements of the First Amendment.

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), however, a majority of this Court concluded that the administrative and financial burdens of establishing and maintaining a separate segregated fund to finance election expenditures were substantial enough to discourage some small, informal organizations like the one in that case from engaging in political speech at all.

> [S]uch duties require a far more complex and formalized organization than many *small groups* could manage. Restriction of solicitation of contributions to "members" vastly reduces the sources of funding for organizations with either few or no formal members, directly limiting the ability of such organizations to engage in core political speech . . . . Faced with the need to assume a more sophisticated organizational form . . . and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

479 U.S. at 254-255 (emphasis added). For these reasons, the Court concluded that the statute's "practical effect on MCFL in this case is to make engaging in protected speech a severely demanding task." *Id.* at 256.[5]

None of these concerns are applicable to the State Chamber. The State Chamber is a state-wide organization that has been in existence since 1959. Un-

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[5] The plurality opinion also listed among the administrative burdens on MCFL's speech the FECA's requirements that separate segregated funds, like other political committees, "adopt specific accounting procedures" and "file periodic detailed reports . . . ." 479 U.S. at 255. However, only four Justices joined in this portion of the opinion, and Justice O'Connor filed a separate concurring opinion to make clear her view that "the significant burden on MCFL in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act." *Id.* at 266. Accordingly, a majority of the Court rejected the suggestion in the plurality opinion that the FECA's recordkeeping and disclosure requirements could be a cognizable burden on MCFL's First Amendment rights.

like MCFL, which was funded by voluntary donations, the State Chamber has a steady source of financial support from the dues which its 8,000 members are required to pay to obtain the many benefits of membership. More importantly, the State Chamber has operated a potent separate segregated fund since 1977 (J.S. App. 42a) and there is no evidence that it has been unable to publicize its political views adequately through the political expenditures it has made from that fund in every election since 1977.[6] To the contrary, the State Chamber has been highly successful in the electoral activities financed through its separate segregated fund, and most of the candidates it has supported in recent years have won (J.S. App. 66a-67a; J.A. 162a-163a). Indeed, the State Chamber's success and expertise in operating a separate segregated fund is so well recognized that other corporations and chambers of commerce have turned to it for assistance and instruction in how to form and operate separate segregated funds (J.A. 158a-161a). It even sponsors seminars for candidates on campaign management and ways to get elected to public office (J.A. 160a-161a).

In short, in contrast to MCFL, the State Chamber is a large, sophisticated corporation which has *already* adopted all of the organizational forms required to finance its independent expenditures successfully through a separate segregated fund. Thus, the State Chamber is not the kind of corporation whose political speech could be inhibited because of its "inability to form" a separate segregated fund. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 255 n.8. This alone is sufficient reason to conclude that the First Amendment is not violated by requiring the State Chamber to finance its independent election expenditures from its separate segregated fund.

[6] The State Chamber has an eligible class of at least 50,000 individuals from which it can solicit contributions to its separate segregated fund under the Michigan Act (J.A. 156a-157a) and it has been quite successful in doing so. During the 1983-84 election cycle, the separate segregated fund raised more than $102,000 and it projected having more than $140,000 to spend in the 1986 primary and general elections (J.A. 143a, 162a).

B. Compelling State Interests Are Served By Application Of Section 54(1) To The State Chamber

Even if section 54(1) were found to burden indirectly the State Chamber's ability to make election expenditures it is well settled that "'[n]either the right to associate nor the right to participate in political activities is absolute' . . . [e]ven a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), *quoting CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973) and *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975).

This Court has already confirmed that section 441b's regulation of election expenditures by most corporations serves the substantial governmental interest in maintaining the integrity of candidate elections. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 256-259. Reaffirming the need to curb the use in elections of "the substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," which it

had already found compelling in *FEC v. National Right to Work Committee*, 459 U.S. 197, 207 (1982), the Court explained in *MCFL* that "the corrosive influence of concentrated corporate wealth" could threaten "the integrity of the marketplace of political ideas." 479 U.S. at 257.

> Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace . . . . The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

FEC v. Massachusetts Citizens for Life, 479 U.S. at 257-258. By requiring corporations to finance their spending from separate segregated funds made up of voluntary individual contributions for political purposes, the Court said, "§ 441b seeks to prevent this threat to the political marketplace," for "[t]he resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee." *Id.* at 258 (emphasis in original).

The Court majority ultimately found that 2 U.S C. § 441b could not constitutionally be applied to MCFL, not because the purposes behind section 441b were not sufficiently compelling, but because "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 263. Observing that "the class of organizations affected by our holding today" may be "small," the Court carefully set out three characteristics of MCFL that

it specified as "essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264. These were that MCFL: 1) was formed for the express purpose of promoting political ideas and could not engage in business activities, 2) had no shareholders or persons financially affiliated with it, and 3) was not established by a business corporation and had a firm policy against accepting money from such entities. 479 U.S. at 264. A corporation's inability to show it satisfies any one of these three "essential" criteria would be sufficient to take it out of the narrow class of corporations covered by *MCFL*. 479 U.S. at 264 n.13. As we show below, however, the State Chamber fails to meet any of them. Thus, the compelling purposes supporting the statute are fully applicable to the State Chamber.

The Court found the first criterion—that the corporation was formed for the express purpose of promoting political ideas and cannot engage in business activities—essential to its holding because it "ensures that political resources reflect political support." 479 U.S. at 264. *See also id.* at 259. ("The resources [MCFL] has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace"). Rather than merely advocating political ideas, however, the State Chamber's activities are primarily designed to serve the commercial interests of its members, both by promoting legislative actions that would make Michigan businesses more profitable and by sponsoring seminars, publishing newsletters and directories, and distributing data to assist its members in operating more successful businesses (J.A. 42a; J.S. App. 22a-23a, 41a-42a). Moreover, far from being unable to engage in business activities itself, the State Cham-

ber derives income from the sale of at least some of these services to the public (J.A. 40a-41a), and even has a profit making subsidiary (J.A. 137a). In short, in contrast to MCFL, the State Chamber's business is not promoting ideas; its business is promoting business.

This Court found the second criterion—that MCFL had no shareholders or persons financially affiliated with it—essential to its holding because it ensures "that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." 479 U.S. at 264. The State Chamber provides services to its members that assist them in increasing business profits and in facilitating business contacts and employment opportunities (J.A. 41a, 42a), which are valuable commercial benefits. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 625-626 (1984). Other benefits such as group insurance and publications at reduced membership rates (J.A. 41a, 42a) are of direct financial value to members. Indeed, the prestige in the business community of being a member of the Chamber of Commerce is itself undoubtedly a valuable commercial asset, not unlike membership in the local bar association for a lawyer. These benefits deriving from membership in the State Chamber clearly represent a powerful financial incentive for members to continue to pay dues to the Chamber even if they don't agree with its stand on political issues. Thus, unlike MCFL, the resources in the State Chamber's treasury reflect in large part its ability to provide valuable benefits to its members, not merely popular support of its position on political issues.

This Court found the third criterion—that MCFL had not been established by a business corporation

or labor union and had a firm policy against accepting contributions from such entities—essential to its holding because it "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 264. This criterion reflects the intention expressed by Congress that business associations not be able to convert their corporate members' dues into political expenditures that those corporations themselves would be prohibited from making.[7]

The State Chamber clearly fails to satisfy this criterion as well. The State Chamber not only accepts money from business corporations but most of its membership consists of corporations. Indeed, the court of appeals acknowledged that 75% of the State Chamber's treasury funds come from business corporations (J.S. App. 25a). Moreover, the State

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[7] During the Senate debates on the original statutory ban on corporate election expenditures, Senator Taft repeatedly confirmed this intention.

> Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal. In any event, so long as the money comes from corporations, and with their knowledge, I think it would be clearly illegal anyway, and they would be participating as corporations in spending for political purposes.
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> * * * *
>
> [I]f an association of manufacturers accepts contributions from corporations and others that violate the laws by making contributions for political purposes, I think it will be an accessory with those corporations and will be liable under the act.

93 Cong. Rec. 6438, 6447 (1947), *reprinted in* II NLRB, *Legislative History of the Labor Management Relations Act, 1947* at 1531, 1548 (1948).

Chamber appears to have been established at least in part by business corporations (J.S. App. 20a), and its primary purpose of existence is to serve the interests of business (J.S. App. 41a). Thus, the State Chamber represents precisely the sort of conduit for business corporation funds that this Court was at pains to exclude from its ruling in *MCFL*. This Court's opinion in *MCFL* makes clear that corporations like the State Chamber that accept financial support from business corporations fall outside the small class protected by that decision.[8]

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[8] The Commission has construed this Court's decision in *MCFL* to mean what it says—that corporations that are willing to accept financial support from corporations or unions are not within the small class protected by that decision. *See* FEC Advisory Opinion 1987-7, 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5889 (April 6, 1987). Nevertheless, corporations that accept corporate or union financing have persisted in litigating their entitlement to rely upon that decision. In addition to the instant case, five nonprofit corporations that admit having accepted some funding from business corporations or unions have claimed the protection of the *MCFL* rule in litigation against the Commission. In *United States Defense Committee v. FEC*, No. 84-CV-450 (N.D.N.Y. April 27, 1988), *vacated on other grounds*, 861 F.2d 765 (2d Cir. 1988), the district court found that the corporation was not entitled to rely on *MCFL* because it admitted accepting financial support from business corporations, but the court of appeals resolved the case without reaching that issue. (A copy of the district court's opinion was attached to the Commission's brief in support of the Jurisdictional Statement in this case.) *FEC v. National Organization for Women*, —— F. Supp. —— (D.D.C. 1989), and *Maine Right to Life Committee v. FEC*, 708 F. Supp. 9 (D.Me. 1989), were decided by the district courts without reaching this issue. *FEC v. National Rifle Association*, No. 85-1018 (D.D.C. filed March 29, 1985), and *FEC v. Survival Education Fund, Inc.*, No. 89-CIV-0347 (S.D.N.Y. filed Jan. 17, 1989), are still pending before the district courts. Dozens of other nonprofit corporations have

The appellate court's suggestion (J.S. App. 25a-26a) that the Michigan Act's reporting requirements satisfy this concern is simply wrong. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 262, this Court discussed at length the federal statute's comparable requirements for reporting independent expenditures, yet it still found MCFL's policy against accepting funds from business corporations to be essential to its holding. Requiring the State Chamber to report its election expenditures would do nothing to prevent it from *acting* as a conduit for corporate funds, because money the State Chamber receives from its corporate members would still be used to fund the expenditures. *Cf. United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 118-119 (1982). It was MCFL's clear inability to *act* as a conduit because it would accept no corporate funds that this Court found crucial to its conclusion that the FECA's purposes were inapplicable.[9]

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also raised this issue in proceedings currently before the Commission that are still subject to the confidentiality requirements of 2 U.S.C. §§ 437g(a)(4)(B), 437g(a)(12).

[9] This Court found the governmental interest in disclosure of the source of funds spent on election advocacy to be inapplicable in *MCFL* because 2 U.S.C. § 434(c) requires reporting of the identities of all those persons who make contributions to the corporation in excess of $200 "who request that the money be used for independent expenditures." *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 262. The State Chamber represents a disclosure problem the Court did not address—a corporation whose election expenditures come from a treasury made up in part of funds from business corporations who have *not* specified that their contributions be used for election expenditures. Such an organization would have *no* contributions at all to report under 2 U.S.C. § 434(c),

In sum, the State Chamber cannot satisfy either part of this Court's decision in *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986). The Michigan Act does not burden the State Chamber's ability to engage in political speech in the manner found in *MCFL*, and even if it did, the State Chamber cannot satisfy any of the three prongs of the Court's test for demonstrating that the important governmental interests behind the statute are inapplicable. If the State Chamber has a constitutional right to make election expenditures from its corporate treasury, it is difficult to imagine why virtually any trade association or other nonprofit group established by business corporations or unions would not also be able to spend any funds received from corporate or union members to affect candidate elections. Such a result would nullify the explicit limitations this Court placed upon its decision in *MCFL*, open an avenue through which virtually unlimited amounts of corporate and union money could be diverted to electoral campaigns, and thus substantially undermine congressionally mandated limitations upon the use of corporate and union wealth to influence the outcome of federal elections which have been in effect for more than 40 years. Therefore, the decision of the court of appeals should be reversed.

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even though its business corporation supporters are all fully aware that they are helping to finance election expenditures to benefit their business interests. Requiring corporations to make election expenditures only from a separate segregated fund made up exclusively of contributions that are earmarked for election spending ensures that the sources of the funds spent by such a corporation on election advocacy are fully reported.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals that MCL § 169.254(1) is unconstitutional as applied to the Michigan State Chamber of Commerce should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICHARD H. AUSTIN, Michigan Secretary of State, and
FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

This amicus curiae brief is submitted by Common Cause in support of appellants Richard H. Austin, the Secretary of State of Michigan, and Frank J. Kelley, the Attorney General of Michigan. By letters filed with the Clerk of the Court, appellants and appellee Michigan State Chamber of Commerce have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Common Cause is a nonprofit, nonpartisan organization with approximately 280,000 members. One of its central purposes is to further honest and responsible government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It has filed briefs as party or *amicus curiae* in several previous cases before

this Court concerning the constitutionality and implementation of the federal election laws,[1] including *FEC v. Massachusetts Citizens for Life, Inc*,[2] the decision whose application is at issue in the present case. Common Cause believes that this case raises important issues that go to the heart of legislative prohibitions on corporate spending in election campaigns.

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"),[3] this Court recognized the legitimacy of the interests served by prohibiting corporations from making independent expenditures in candidate elections. Such prohibitions prevent the unfair deployment of wealth amassed through the corporate form, which represents economic success rather than political support, and protect dissenting shareholders of corporate contributors from being forced to support political candidates whom they may in fact oppose. The Court held, however, that the federal statute prohibiting campaign expenditures by corporations was unconstitutional as applied to MCFL, an ideological group organized as a nonprofit corporation. The Court reasoned that three essential characteristics of MCFL—its express political purposes, the purely voluntary nature of its support, and its exclusive reliance on individual donations—removed any danger that its campaign spending would cause the same harms as business corporation expenditures.

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[1] *See, e.g., FEC v. National Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480 (1985); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *Buckley v. Valeo* ("*Buckley*"), 424 U.S. 1 (1976).

[2] 479 U.S. 238 (1986).

[3] *Id.*

The Sixth Circuit erred in placing the Michigan State Chamber of Commerce ("the Chamber") within the exception this Court fashioned in *MCFL*. First, unlike MCFL, the Chamber was created by business corporations and receives most of its income from these corporations. Thus, the Chamber is a conduit for "the type of direct spending that creates a threat to the political marketplace."[4] Second, the Chamber is not a purely ideological organization but also provides economic benefits for its members; consequently, its members may not intend that their contributions be used for political activities. Third, those members who disapprove of the political use of their money cannot withdraw their support without suffering an economic penalty. In each of these respects, the Chamber more closely resembles traditional business corporations than ideological advocacy organizations like MCFL.

The Chamber is difficult to distinguish from thousands of other incorporated business organizations, including trade associations and business leagues. If the Chamber is permitted to make campaign expenditures, virtually the entire incorporated trade association sector could assert the same constitutional right. Vast amounts of money from business corporations would be expended through trade association conduits for campaign purposes. As a result, legislative efforts to prevent the corrupting influence of corporate money upon the electoral process would be drastically undermined.

To safeguard the compelling interests served by prohibiting corporate campaign spending, this Court should reaffirm the circumscribed boundaries of the *MCFL* exception. Legislatures must be permitted to prohibit campaign expenditures by any nonprofit corporation that does not rely exclusively on non-corporate contributions. No less restrictive means would effectively protect the electoral process and the interests of dissenting shareholders.

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[4] *Id.* at 264.

Because money is fungible, there is no meaningful way in which a nonprofit corporation can segregate contributions from business corporations and funds originally derived from other sources.[5] The bright-line rule established in *MCFL* provides the only administrable standard of conduct for nonprofit corporations and prevents circumvention of campaign finance laws by business corporations.

ARGUMENT

I. THE MICHIGAN STATE CHAMBER OF COMMERCE FALLS OUTSIDE THE *MCFL* EXCEPTION, WHICH IS LIMITED TO IDEOLOGICAL ADVOCACY CORPORATIONS THAT DO NOT CAUSE ANY OF THE HARMS GENERALLY CREATED BY CORPORATE CAMPAIGN SPENDING.

In *FEC v. Massachusetts Citizens for Life*,[6] this Court reaffirmed the legitimate governmental interests served by prohibiting corporations from making independent expenditures in candidate elections. The Court held, however, that the federal statute prohibiting such expenditures[7] was unconstitutional as applied to MCFL, an ideological advocacy group organized as a nonprofit corporation. Three characteristics of MCFL—its express political purposes, the purely voluntary nature of its support, and its exclusive reliance on individual contributions—were "essential" to the Court's holding.

In this case, the Court of Appeals misconstrued *MCFL* by holding that electoral expenditures by the Michigan State Chamber of Commerce are constitutionally protected. The Chamber, an entity created and financed by

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[5] *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

[6] 479 U.S. 238 (1986).

[7] 2 U.S.C. § 441b (1982).

business corporations, is fundamentally different from ideological advocacy corporations like MCFL. The Sixth Circuit's decision negates the safeguards fashioned by this Court to protect the electoral process from "political war chests funneled through the corporate form."[8]

A. The Unique Nature of Corporations Creates Compelling Interests That Justify a Prohibition of Campaign-Related Expenditures from Corporate Funds.

The history of campaign finance regulation demonstrates an unwavering legislative judgment that "the special characteristics of the corporate structure require particularly careful regulation."[9] Beginning shortly after the turn of this century, Congress and numerous state legislatures have adopted and strengthened restrictions on corporate financial activity in political campaigns.[10] Today, the federal government and at least twenty states prohibit both contributions and expenditures by corporations in connection with elections to public office, while typically permitting corporations to establish PACs financed by voluntary contributions.

In *MCFL*, this Court reaffirmed two compelling interests served by the regulation of corporate electoral activity. First, such regulation protects the integrity of the political marketplace from the unfair deployment of wealth amassed through the special advantages that accompany the corporate form.[11] As this Court recently

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[8] *MCFL*, 479 U.S. at 257 (quoting *NCPAC*, 470 U.S. at 501).

[9] *FEC v. National Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 209-10 (1982); *see First National Bank of Boston v. Bellotti* ("*Bellotti*"), 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting) (characteristics of corporations, "so beneficial in the economic sphere, pose special dangers in the political sphere").

[10] For a history of such regulation, *see United States v. International Union United Automobile Workers*, 352 U.S. 567, 570-84 (1957).

[11] *See MCFL*, 479 U.S. at 259; *NCPAC*, 470 U.S. at 495; *NRWC*, 459 U.S. at 207. These advantages include "special rules relating to

declared in *MCFL*, resources in the treasury of a business corporation

> are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[12]

Because the "corrosive influence of concentrated corporate wealth" distorts the political process,[13] there is a compelling governmental interest in ending such influence. That interest has never been more compelling. A continuing series of scandals in the federal government demonstrates the misuse of corporate money to influence government decisions,[14] and the deleterious effects of such corruption on public confidence in our governing institutions.[15]

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such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets." *See Bellotti*, 435 U.S. at 809 (White, J., dissenting).

[12] *MCFL*, 479 U.S. at 258.

[13] *Id.* at 257.

[14] *See In H.U.D.'s Backyard, a Cesspool*, N.Y. Times, June 17, 1989, at A22, col. 1 (late ed.) (discussing influence-peddling by real estate developers seeking HUD grants for housing projects); *Putting a Tighter Rein on the Pentagon's Private Consultants*, Christian Science Monitor, June 12, 1989, at 1 (discussing Pentagon procurement scandals and "Ill Wind" investigation); *Drexel Sought Help From 9 in Congress To Pressure SEC*, L.A. Times, Feb. 1, 1989, at 3, col. 1 (assistance obtained by investment banking firm from members of Congress to whom it had given "direct corporate gifts . . . in the form of honorariums").

[15] *Majority in Poll Criticize Congress*, Wash. Post, May 26, 1989, at A8; *Administration's Ethics Viewed as Average*, Boston Globe, Mar. 30, 1989, at 16; *Turnout Hits 44-Year Low Despite Gains in Voters*, L.A. Times, Nov. 6, 1986, at 20; *Vote Turnout Rate the Second Lowest of 20th Century*, Boston Globe, Nov. 11, 1988, at 17.

Second, in addition to preventing corruption and the appearance of corruption, regulation of the electoral activities of business corporations protects shareholders who invest for economic, rather than political, purposes. This Court has repeatedly recognized a legitimate interest in protecting dissenting shareholders from having their money used for political ends they do not support.[16]

According to the Supreme Court of Michigan, these governmental interests form the basis for the Michigan statute, first enacted in 1913, which is at issue in this case.

> The legislative intent in prohibiting financial involvement of corporations in the elective process was to prevent the use of corporate funds to impose undue influence upon elections. Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.[17]

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[16] *MCFL*, 479 U.S. at 260; *NRWC*, 459 U.S. at 208. *Cf. Pipefitters Local Union 562 v. United States* ("*Pipefitters*"), 407 U.S. 385, 414-415 (1972) ("the dominant concern in requiring that contributions be voluntary was . . . to protect the dissenting stockholder or union member"); *United States v. Congress of Indus. Organizations*, 335 U.S. 106, 113 (1948) (discussing Congress' "feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders").

[17] *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich. 465, 242 N.W.2d 3, 13 (1976) (citations omitted) (ruling on comprehensive campaign finance law that incorporated the prohibition).

It is permissible for the Michigan legislature to focus on corporations in its promulgation of laws regulating campaign spending, even though other types of entities such as unincorporated

These compelling interests apply with equal force both to contributions and to independent expenditures by business corporations. In cases not involving such corporations, the Court has distinguished between independent expenditures and contributions, recognizing greater governmental interests in regulating the latter.[18] In *MCFL*, however, the Court suggested that the distinction between contributions and expenditures on behalf of candidates does not apply with respect to spending by business corporations. The Court stated, "Direct corporate *spending* on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." [19]

The unique structure and purposes of business corporations give rise to compelling justifications for regulation of independent expenditures which simply do not arise when individuals or other types of entities are involved.[20] Corporate treasury money creates an "unfair advantage in the political marketplace," [21] whether

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associations may also present problems. *See MCFL*, 479 U.S. at 258 n.11 ("While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth."). The Court of Appeals did not reach the Chamber's contention that the asymmetry in the treatment of corporations and unions under the Michigan statute violates the equal protection clause. Accordingly, this issue should not be addressed by the Court.

[18] *NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 47. This dichotomy rests on the Court's understanding that, in the absence of prearrangement or coordination of the expenditure with the candidate, the government interest in regulating spending to prevent corruption is greatly reduced. *Id.* at 47.

[19] *MCFL*, 479 U.S. at 257 (emphasis added).

[20] As this Court has observed, the "differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n*, 453 U.S. at 201.

[21] *MCFL*, 479 U.S. at 257.

the corporate money is contributed to a candidate or spent independently to advocate the election or defeat of that candidate. In addition, both uses of corporate funds equally implicate the strong governmental interest in "prevent[ing] an organization from using an individual's money for purposes that the individual may not support." [22]

Furthermore, in contrast to independent expenditure limitations applied to political committees, regulation of corporate independent expenditures does not interfere with the First Amendment right of free association. Business corporations, established for economic purposes, are not "mechanism[s] by which large numbers of individuals of modest means can join together . . ." in organizations that "amplify the voice of [their] adherents" for purposes of political expression.[23] Indeed, by protecting investors against compelled political speech, regulation of corporate electoral activity advances principles of free association.[24]

Moreover, ample alternative means of expression and political participation are available for corporations, including trade associations, that are barred from spending treasury money in election campaigns.[25] Such corporations may establish PACs and may pay for their administrative and fundraising expenses.[26] Using funds

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[22] *Id.* at 260.

[23] *Cf. NCPAC*, 470 U.S. at 494 (citing *Buckley*, 424 U.S. at 22); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981).

[24] *See Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977).

[25] *See Ward v. Rock Against Racism*, No. 88-226, slip op. at 19-20 (U.S. June 22, 1989).

[26] J.A. 136a-138a (testimony of E. James Barrett, president of Michigan State Chamber of Commerce). The Michigan Chamber may make unlimited expenditures of its treasury funds to solicit the directors, officers, and shareholders of all of its members. J.A. 138a. The Chamber's PAC has been highly successful. J.A. 161a-

obtained through voluntary contributions by affiliated individuals, PACs are allowed to make independent expenditures and contribute directly to candidates.[27]

Corporations and trade associations also have an unlimited right to speak out on any issue, through advertisements or in any other manner they choose, provided that they do not expressly advocate the election or defeat of specific candidates. They can spend an unlimited amount to support or oppose issue referenda.[28] They can lobby the legislative and executive branches of government.[29] They can endorse candidates in communications to their shareholders, members, and employees, and urge these individuals to contribute to those candidates.[30] Furthermore, the directors, officers, shareholders and employees of corporations are free to participate in elections as individuals and through unincorporated entities. In sum, a prohibition on independent expenditures by corporations serves compelling government interests while leaving open ample means of political expression.

163a (testimony of Robert S. LaBrant, administrator of the Chamber's PAC). Moreover, the Michigan Chamber has held seminars and prepared a "Mini PAC Kit" as part of an active program to encourage Michigan businesses and trade associations to set up their own PACs, and in part as a result of this effort, the number of such PACs in Michigan has increased seven-fold since 1976. J.A. 157a-161a (LaBrant testimony).

[27] The Chamber's complaint in this case was founded on its inability to publish a particular advertisement in support of a candidate. As a Chamber official acknowledged, the Chamber's PAC could have paid for precisely the same ad, but chose not to do so because it deemed the ad unnecessary to the success of the candidate. J.A. 166a-167a (LaBrant testimony).

[28] J.A. 145a-146a (Barrett testimony); *see Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Bellotti*, 435 U.S. 765 (1978).

[29] J.A. 146a (Barrett testimony); *id.* at 148a-149a (LaBrant testimony).

[30] J.A. 146a (Barrett testimony); *see NRWC*, 459 U.S. 197 (1982).

B. The Chamber of Commerce Is Fundamentally Different From an Ideological Advocacy Organization.

MCFL reaffirmed the legitimacy of expenditure prohibitions as applied to corporations in general, but distinguished a narrowly circumscribed category of nonprofit corporations that pose no "threat of the danger that has prompted regulation."[31] Notwithstanding their corporate form, these ideological corporations differ fundamentally from " 'traditional corporation[s] organized for economic gain' . . . that [have] been the focus of regulation of corporate political activity."[32] Three characteristics of MCFL were "essential" to the Court's holding that it could not constitutionally be prohibited from making campaign expenditures:[33]

> *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities . . . This ensures that *political resources reflect political support*.
>
> *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that *persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.*
>
> *Third*, [it] was *not established by a business corporation or labor union, and it is its policy not to accept contributions from such entities.* This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.[34]

All of these criteria must be satisfied before a nonprofit corporation falls within the *MCFL* exception; the Michigan State Chamber of Commerce satisfies none.

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[31] *MCFL*, 479 U.S. at 263.

[32] *Id.* at 259 (quoting *NCPAC*, 470 U.S. at 500).

[33] *MCFL*, 479 U.S. at 263-264.

[34] *Id.* at 264 (emphasis added).

In defining the category of ideological nonprofit corporations, the Court found it essential that "MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." [35]

In contrast, the Chamber was established by business corporations to promote their economic interests. The Chamber depends heavily on contributions from such entities, which constitute at least 75 percent of its dues-paying members.[36] Thus, the Chamber is a conduit for precisely the type of direct spending that, as the Court has found, threatens the integrity of the electoral process. For this reason alone, the Chamber has no constitutionally protected right to make independent expenditures in political campaigns.

This Court also emphasized that MCFL "was formed for the express purpose of promoting political ideas, and [could] not engage in business activities." [37] Consequently, MCFL's contributors were "fully aware of its political purposes, and in fact contribute[d] precisely because they support[ed] those purposes." [38] Campaign spending by such an organization reflects its political support rather than its business success.[39]

Unlike MCFL, however, the Chamber was not founded for the sole purpose of engaging in political advocacy. One of the Chamber's own publications acknowledges that some of its members believe the Chamber is a "non-

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[35] *Id.*

[36] J.A. 135a (Barrett testimony).

[37] *MCFL*, 479 U.S. at 264.

[38] *Id.* at 260-261.

[39] *Id.*

political organization." [40] Indeed, the Chamber performs numerous functions unrelated to politics. For example, the Chamber provides services to its members including group insurance, a business hotline, a directory of members, regular and special publications, legislative briefings and seminars.[41] To the extent that members join the Chamber to obtain these services and do not desire the use of dues money for campaign expenditures, they cannot be said to authorize the use of their funds for electoral purposes.[42] Thus, the money the Chamber wishes to spend for political advocacy in candidate campaigns partly reflects the Chamber's success in an economic or quasi-

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[40] In a publication describing its political action committee, the Chamber states:

> Chambers and politics . . . more than a decade ago this subject would have been taboo at a Chamber of Commerce meeting. Several generations of Chamber executives had been conditioned to view politics as something akin to leprosy—no surer way to lose a Chamber's tax-exempt status, not to mention harm it's dues income. Chamber executives and members alike felt the Chamber of Commerce was a non-political organization.
>
> That attitude has faded, but is not completely dead.

Michigan State Chamber of Commerce, *The State/Local Chambers of Michigan Working Together in Political Action* 1 (1985); *see* J.A. 79a-84a (use of document at trial). This passage suggests that the Chamber's membership has never reached a consensus as to the desirability of advocacy on behalf of candidates.

[41] *See, e.g.*, Michigan State Chamber of Commerce, *1985-86 Michigan Directory* 1 (1985), J.A. 42a; *see* By-Laws of the Michigan State Chamber of Commerce, J.A. 43a-44a.

[42] *Cf. MCFL*, 479 U.S. at 260. The Chamber has established a political action committee (PAC) that solicits funds separately from individual members and shareholders and officers of corporate members. *See* J.A. 125a-126a (Barrett testimony). A Chamber member could reasonably believe that contributions to the Chamber's PAC are used for electoral spending, but that dues are used only for other purposes. Moreover, given the diversity of the Chamber's membership and the non-political incentives for joining, there is a strong likelihood that some members may be opposed to candidates whom the Chamber's leadership chooses to support.

economic marketplace rather than in the marketplace of political ideas.[43]

In addition, the Court stressed that contributors to MCFL did not face any economic disincentive to withdrawal from the organization if they disagreed with its political activities.[44] Dissenting members had the "readily available remedy" of withholding future contributions.[45] This Court recognized, in contrast, that no such remedy exists with respect to business corporations, whose shareholders or members would suffer economically by withdrawing their support.[46]

Unlike MCFL, but like profit-making corporations, the Chamber has members who may face economic disincentives that would discourage them from withdrawing for political reasons. For example, a small business might lose its ability to obtain group insurance, to participate in education or training programs, to receive information on legislative and regulatory developments, or to include its listing in the Chamber's directory. To protect such members from the unfair choice between their economic well being and their right not to support candidates against their will, the Chamber should be excluded from the small

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[43] *Cf. MCFL*, 479 U.S. at 259. Larger members pay higher dues, providing another link between economic success and the Chamber's revenues. *See* J.A. 46a.

[44] *MCFL*, 479 U.S. at 262, 264 ("given a contributor's awareness of the political activity of the respondent, as well as the readily available remedy of refusing further donations, the interest in protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL.").

[45] *Id.* at 262.

[46] *Id.* at 260 ("because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union."); *NWRC*, 459 U.S. at 208; *see also Pipefitters*, 407 U.S. at 414-15.

class of ideological corporations that may make expenditures in election campaigns.

In sum, the Chamber differs in all material respects from the paradigmatic ideological nonprofit corporation described in *MCFL* and exemplified by MCFL itself. Yet the Sixth Circuit erroneously concluded that the Chamber, like MCFL, may not constitutionally be prohibited from making campaign expenditures.

II. CAMPAIGN SPENDING BY CHAMBERS OF COMMERCE AND TRADE ASSOCIATIONS WOULD DRASTICALLY UNDERMINE PROHIBITIONS ON DIRECT CAMPAIGN SPENDING BY BUSINESS CORPORATIONS.

Most, if not all, trade associations and chambers of commerce [47] possess the same characteristics that the Sixth Circuit deemed sufficient to justify an exemption from legislative prohibitions on campaign spending.[48] Under the decision below, therefore, virtually the entire incorporated trade association sector could assert a constitutional right to make campaign expenditures. As a result, vast amounts of business corporation money would flow through conduits into the electoral process, even though such corporate spending may constitutionally be prohibited.

Purporting to apply the first criterion in *MCFL*, the Court of Appeals declared that the Chamber "exists for purely ideological purposes." [49] If that application of

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[47] The total number of U.S. trade associations, their local chapters, and independent local or regional groups is approximately 40,000. *National Trade and Professional Associations of the United States* 7 (J. Russell 24th ed. 1989).

[48] J.S. App. 22a-28a, 856 F.2d at 789-90.

[49] J.S. App. 27a, 856 F.2d at 790. The Court recognized, however, that the Chamber performs various services for its members. *See* J.S. App. 3a, 20a, 22a, 856 F.2d at 784, 788, 789.

MCFL is correct, then all trade associations could be so characterized. In its multiple objectives and purposes, the Chamber is typical of trade associations and business leagues. Such organizations normally perform a variety of mutual assistance functions and lobby for their members' business interests. Yet, like the Chamber, virtually any incorporated trade association could describe its activities in political or ideological terms. For example, the "objects and purposes" of the National Association of Manufacturers include the "dissemination of information with respect to the principles of individual liberty and ownership of property," as well as the establishment of "a mutual and cooperative organization of American manufacturers for the fostering of their trade, business and financial interests." [50] Indeed, it is difficult to imagine any policy which a lobbying group working to promote the economic interests of business corporations could not support or oppose with ideological or political arguments.[51]

The Court of Appeals concluded that the Chamber satisfied *MCFL*'s second criterion because members pay annual dues and do not have a claim on the Chamber's earnings. Consequently, the Court of Appeals asserted,

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[50] *Constitution of the National Association of Manufacturers of the United States of America*, art. II, § 1 (rev. 1985); *see* U.S. Chamber of Commerce, *We Believe in America and the Free Enterprise System That Made It Great* 2, 3, 12 (1984); *id.* at 2 ("If your firm is to meet the challenge of those who would handcuff free enterprise and claim more and more of your hard-earned profits, you need an ally that will fight business' fight as only the U.S. Chamber of Commerce can."); Edison Electric Institute, *1987-1988 Annual Report* 2 (mission statement of trade association of privately-owned electric utilities).

[51] Privately-owned electric utilities espouse the virtues of free enterprise; oil producers urge various measures that would increase the nation's energy independence while increasing the price of domestically produced oil; publishers and broadcasters have an interest in promoting freedom of speech; defense contractors' groups assert that national security requires increased defense spending.

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members are "not akin to minority shareholders of a 'traditional' corporation who do not support the same candidates supported by the corporation's independent political expenditures." [52] Again, under this reasoning, most trade associations would fit within this criterion because they are organized on a nonprofit basis and collect dues from their members.[53]

With respect to the third *MCFL* criterion, the Court of Appeals found that the Chamber was "not a subcorporation established by a parent corporation," and accordingly was "not established by a business corporation." [54] The same reasoning would apply generally to incorporated trade associations, which are created and supported not by a single corporation but by a number of member businesses.[55]

In sum, under the Sixth Circuit's misapplication of the three *MCFL* criteria, virtually all trade associations or business leagues would qualify for the *MCFL* exception.

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[52] J.S. App. 24a, 856 F.2d at 789.

[53] *National Trade and Professional Associations of the United States*, *supra note* 47, at 7. Section 501(c)(6) of the Internal Revenue Code provides tax-exempt status for "business leagues" and trade associations only if they are "not organized for profit and no part of [their] net earnings . . . inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6) (1982); *see* R. Statham & R. Buek, *Associations and the Tax Laws* 5-11 (1978); Kates & Zimmerman, *The Tax-Exempt Business League and Its Functions*, 8 B.C. Ind. & Comm. L. Rev. 953, 954 (1966-67).

[54] J.S. App. 24a-25a, 856 F.2d at 789.

[55] *National Trade and Professional Associations of the United States*, *supra* note 47, at 7. The Court of Appeals also asserted that the Chamber was not a conduit for business corporate spending because it believed that Michigan law required the Chamber to disclose the sources of funds used for independent expenditures. As appellants demonstrated in the Jurisdictional Statement, this assumption was based on a mistaken interpretation of Michigan law. J.S. 22-23.

By holding that the Chamber is entitled to the same constitutional protection as MCFL, the Sixth Circuit has opened a potentially massive loophole for business corporate political spending. Every geographic area and every industry has one or more trade associations, which are typically nonprofit corporations with corporate members. The trade association sector has enormous financial resources,[56] augmented by the resources of its member corporations. If the Sixth Circuit's decision is upheld, business corporations would be virtually certain to increase the amounts of corporate money expended through trade association conduits for campaign purposes.[57]

Currently, business corporations and incorporated trade associations must create separate segregated funds (PACs) to participate in election campaigns at the federal level and in states that prohibit direct corporate involvement. PAC fundraising activities are subject to substantial restrictions,[58] which this Court unanimously sustained

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[56] The Michigan State Chamber of Commerce had dues income of $1.85 million in 1984-85. The organization members of the United States Chamber of Commerce include 1,100 trade and professional associations and 2,800 chambers of commerce. U.S. Chamber of Commerce, *1989 Annual Report* 3.

At least 750 trade associations with annual budgets exceeding $1 million have corporate members whose interests may be affected by governmental policies; of these, more than 200 have annual budgets exceeding $5 million. Analysis of lists published in *National Trade and Professional Associations of the United States, supra* note 47, at 411-15. The Edison Electric Institute alone had $32.1 million in income from membership dues during 1987. Edison Electric Institute, *1987-1988 Annual Report, supra* note 50, at 22.

[57] Trade associations and business leagues, exempted from federal income tax under 26 U.S.C. § 501(c)(6), are not required to refrain from political activity in order to preserve their tax-exempt status. *See* T. Geer, *Tax Management, Estates, Gifts, and Trusts: Exempt Organizations—Exemption Requirements* A-15 (1986).

[58] Under federal law, a corporation or incorporated trade association may pay the administrative and fundraising expenses of its

in *NWRC*.[59] In contrast, these restrictions would not apply to business corporation spending through intermediary nonprofit corporations. Such spending would be certain to increase dramatically.

The extensive financial activity by corporate and trade association PACs today gives proof of the enormous interest of business corporations in influencing the political process. Approximately two thousand business corporations and hundreds of trade associations have established affiliated PACs at the federal level.[60] In the 1987-88 election cycle, according to Federal Election Commission records, corporate PACs disbursed more than $89 million, including $56 million in contributions to candidates.[61]

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affiliated PAC, 2 U.S.C. § 441b(b)(2)(C) (1982), but the PAC may solicit contributions only from a restricted class of individuals. A PAC sponsored by a corporation may solicit the stockholders and executive personnel of its parent corporation. *Id.* § 441b(b)(4)(A)(i). The PAC of a trade association may solicit the stockholders and executive or administrative personnel of any member corporation that has approved such solicitation, but a corporation may authorize solicitation by only one trade association per year. *Id.* § 441b(b)(4)(D). Individual contributions to a PAC are limited to $5000 per year. *Id.* § 441a(a)(1)(C).

Michigan law also restricts fundraising solicitations by corporate PACs. It allows a PAC sponsored by a nonprofit corporation to solicit contributions only from individual members and from stockholders, officers, directors, or managerial personnel of corporate members. Mich. Comp. Laws § 169.255 (West Supp. 1988), J.S. App. 107a-108a. Unlike the federal statute, it does not restrict the frequency with which such solicitations may be made. J.A. 137a-138a (Barrett testimony).

[59] These restrictions are designed to protect the political process from the distorting effects of corporate wealth and to assure that contributions are genuinely voluntary. *NRWC*, 459 U.S. at 208.

[60] Federal Election Commission, Press Release, April 9, 1989, at 2. In Michigan alone, more than 200 PACs have been established by corporations, trade and professional associations, and local chambers of commerce to operate in state politics. J.A. 158a.

[61] Federal Election Commission, Press Release, April 9, 1989, at 3.

FEC statistics also show that the largest trade association PACs deployed substantial sums of money. For example, the Realtors Political Action Committee made disbursements of $5.9 million during the 1987-88 election cycle.[62] If incorporated trade associations are permitted to spend dues money in election campaigns, this means of political influence can be expected to attract much larger sums than PACs from corporate treasuries amassed for business purposes.

III. TO PROTECT THE INTEGRITY OF THE ELECTORAL PROCESS, THE *MCFL* EXCEPTION MUST CONTINUE TO APPLY ONLY TO NONPROFIT CORPORATIONS THAT DO NOT RECEIVE FUNDS FROM BUSINESS CORPORATIONS.

Unless this Court reaffirms the circumscribed boundaries of the exception fashioned in *MCFL*, Congress and state legislatures will be powerless to protect the electoral process from an influx of business corporation funds through incorporated nonprofit conduits. A prohibition on campaign expenditures by incorporated trade associations and chambers of commerce would not suffice. Every nonprofit corporation that accepts money from business corporations must be prohibited from making campaign expenditures. The Court should adhere to that bright-line rule for two reasons. First, it is economic nonsense to say that nonprofit corporations can, in any meaningful sense, segregate funds received from business corporations. Second, any other rule would require the courts to decide fundamentally unanswerable questions of degree and would invite circumvention by business corporations.

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[62] Build Political Action Committee, sponsored by the National Association of Home Builders, and Dealers Election Action Committee, sponsored by the National Automobile Dealers Association, each spent $1.7 million; the American Bankers Association's BankPac spent $1.36 million. *Id.* at 27.

Requiring a nonprofit corporation to separate its business corporation contributions from its other funds would not effectively prevent the corporate contributions from harming the political process. Money is fungible.[63] When an organization engages in multiple activities, money from one source that is used for one activity frees up money from other sources to be used for other activities. If, for example, a nonprofit corporation spends $5000 donated by a business corporation for educational purposes, it can use $5000 from other sources that would otherwise have been spent on educational programs for campaign-related expenditures. By funneling corporate wealth into the political process through a conduit, the business corporation causes the same two harms that this Court has recognized in the context of direct expenditures by business corporations.[64]

This Court has recognized the "substitution effect" resulting from the fungibility of money in the context of union funds. In *Retail Clerks v. Schermerhorn*,[65] a union was engaged in both collective bargaining and other non-collective bargaining activities. The Court rejected the

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[63] *See* D. McCloskey, *The Applied Theory of Price* 8-9 (1982) (example of mother giving child $500 for something he would purchase in any event; explaining futility of distinguishing between purchases with mother's money and purchases with money from other sources; child is simply $500 richer).

[64] *See supra* Part I.A. If the nonprofit corporation spends less than $5000 from all sources on campaign expenditures, then the effect of the business corporation's donation on the political process will be less than dollar for dollar. However, as long as the nonprofit corporation spends any amount on campaign expenditures, there is no economically meaningful way to assure that the political expenditures were not made with the business corporation's money. Even if the nonprofit corporation segregates its funds in form, claiming to use its money from business corporations solely for its nonpolitical activities, the practical consequences will be no different because of the substitution effect.

[65] 373 U.S. 746, 753-54 (1963).

union's argument that fees paid by nonmembers were used solely to pay the costs of collective bargaining, and that the union's other activities were supported solely by members' dues. "[E]ven if all collections from nonmembers must be directly committed to paying bargaining costs," the Court explained, "*this fact is of bookkeeping significance only rather than a matter of real substance.*" [66] As the Court recognized,

> If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share . . . . By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities.[67]

The substitution effect was also recognized in *Abood v. Detroit Board of Education.*[68] In that case, the Court held that a dissenting employee is constitutionally entitled to refrain from paying the proportion of union charges or assessments corresponding to the proportion of aggregate income that the union spends for political purposes. The union's use of dissenting employees' payments for political purposes would not adequately protect the rights of the dissenters.[69]

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[66] *Id.* at 753 (emphasis added).

[67] *Id.* at 754.

[68] 431 U.S. at 240-41.

[69] *Id.* at 237 n.35 (quoting *Retail Clerks v. Schermerhorn,* 373 U.S. at 753-54). Subsequently, this Court held that it is not constitutionally permissible to collect the full amount and then to refund an appropriate proportion to a nonmember employee, for even the temporary use of these funds for political purposes is forbidden. *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 305-06 (1986).

This Court also recognized the substitution effect in *Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 541, 543-44 & n.6 (1983), which dealt with the Internal Revenue Code provisions that prohibit the use of tax-deductible contributions for political activities. A nonprofit corporation challenged the requirement that it conduct its lobbying activities through a separate organization in order to retain 501(c)(3) tax-exempt status for its publishing and litigation activities. The Court rejected the First Amendment challenge. It was not sufficient, in order to prevent the use of tax-deductible contributions to subsidize lobbying, to require simply that the nonprofit corporation spend its tax-deductible contributions to finance activities other than lobbying.

The commingling problem is equally applicable in the present context. A nonprofit corporation cannot meaningfully segregate funds from prohibited corporate sources and funds from permissible sources, using only the latter for campaign expenditures. Every corporate dollar spent on nonpolitical activities frees up a dollar for political purposes. Indeed, the only way to assure that business corporation funds do not improperly influence the electoral process is to prohibit nonprofit corporations that accept such funds from making any expenditures in connection with election campaigns. This is the sound rule established by *MCFL.*

No less restrictive alternative would effectively protect the integrity of the political process.[70] Requiring nonprofit corporations to disclose their contributors would not protect against the harms that accompany indirect political expenditures by profit-making corporations. Ag-

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[70] *See Wayte v. United States,* 470 U.S. 598, 610 (1985) (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)) (government regulation of speech is sufficiently justified where certain conditions are met, one of which is that the restriction is no greater than necessary); *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 804-05 (1984) (same); *Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340 (1986) (commercial speech may be restricted where restrictions are no more extensive than necessary to serve a substantial government interest); *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (infringement on right to associate for expressive purposes might be justified where compelling state interests cannot be achieved through significantly less restrictive means).

gregated corporate wealth would still be deployed unfairly in the political arena, and the rights of dissenting shareholders would still be violated.

Similarly, prohibiting independent campaign expenditures by some subcategory of those nonprofit corporations that accept funds from business corporations would not solve the problem. Whenever such nonprofit corporations spend money to support or oppose candidates, the expenditure harms the political process and the dissenting shareholders of the original business corporation donors.[71] To be sure, campaign spending by nonprofit corporations receiving a substantial portion of their money from business corporations may cause these harms to a greater degree than spending by an entity primarily supported by non-business sources. Nevertheless, any attempt to draw a line, short of an absolute prohibition on the indirect use of corporate money, would fail to remedy some of the problem and would invite circumvention of the basic prohibition on corporate spending.

In addition, line-drawing efforts would force the executive branch and the courts to grapple with difficult questions of degree. No workable distinction can be drawn between primarily ideological entities that receive money from business corporations, and those that are primarily designed to promote business interests. First Amendment values dictate that courts should not attempt to determine whether an association is "genuinely ideological."[72] In

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[71] These injuries occur even if business corporations exercise no influence or control over the nonprofit entity, even if such corporations provide a small proportion of the nonprofit organization's total income, and even if the nonprofit corporation qualifies for tax-exempt status as a charitable or civic organization.

[72] *Cf. United States v. Ballard*, 322 U.S. 78, 86, 87 (1944) (impermissibility of judging truth or falsity or sincerity of religious beliefs).

contrast, the bright-line rule established in *MCFL* provides the only administrable standards of conduct.[73]

In *FEC v. National Right to Work Committee*, this Court recognized that it should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[74] A legislature may constitutionally enact a prophylactic rule directed at a potential harm even if it applies to entities which have not yet actually exhibited, or are less likely to exhibit, the harm the legislature attempts to eradicate.[75]

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[73] To be sure, *MCFL* created an exception to the statutory bright-line rule at issue—a ban on independent expenditures by *all* corporations. The Court found that political spending by MCFL presented *none* of the harms caused by such spending by business corporations; thus, the distinction between MCFL and more traditional business corporations was a difference in kind, not merely in degree. But both the majority and dissent agreed that this Court "should not second-guess a decision to sweep within a broad prohibition activities that differ in degree, but not in kind." 479 U.S. at 263; *id.* at 268 (Rehnquist, J., dissenting). There are only differences in degree, not in kind, among nonprofit corporations that receive funds from business corporations and also seek to make expenditures in election campaigns. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-99 (1984) (declining to second-guess Park Service's decision to ban all sleeping in Lafayette Park, including sleeping as a mode of expressive conduct, rather than to limit the number of such demonstrations in order to protect the park).

[74] *NRWC*, 459 U.S. at 210. *See Buckley*, 424 U.S. at 83 ($10 recordkeeping threshold and $100 reporting threshold are constitutional because the "line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"); *cf. Rosario v. Rockefeller*, 410 U.S. 752, 760-61 (1973) (not unconstitutionally arbitrary to impose voter registration deadline several months before election to avoid disruptive "party raiding" in primary elections, even though many citizens seeking to register after the deadline will not possess such impermissible motives).

[75] *See NCPAC*, 470 U.S. at 500 (1985) (constitutional to prohibit contributions by membership corporations even though they

When a perceived evil is powerful enough to jeopardize the integrity of the democratic political process, the legislature should be permitted to enact laws designed not only to remove the direct harm but also to foreclose all probable avenues of circumvention.[76]

Congress decided to take this step more than forty years ago. In 1947, it prohibited independent expenditures in federal election campaigns by trade associations, chambers of commerce, and other corporations receiving money from business corporations. During floor debate, Senator Barkley noted that members of the United States Chamber of Commerce and the National Association of Manufacturers "do not contribute their funds to these organizations primarily for political purposes." He asked Senator Taft, the sponsor of the legislation, if such an organization would be prohibited, "out of funds contributed by corporations into the general fund of the associa-

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"might not exhibit all of the evil that contributions by traditional economically organized corporation[s] exhibit"); *NRWC*, 459 U.S. at 210 ("[w]hile § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation"); *Buckley*, 424 U.S. at 70-71 (FECA disclosure requirements are constitutional as applied to minor parties, despite diminished governmental interests in disclosure); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (constitutional to ban political activity by all types of classified federal employees, even though "the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties); *cf. War[illegible] v. Rock Against Racism*, No. 88-226, slip op. at 14-17 (U.S. June 22, 1989) (regulation of time, place, or manner of protected speech need not be the least restrictive means of doing so; regulation is constitutionally valid if it is not substantially broader than necessary).

[76] *Cf. California Medical Ass'n v. FEC*, 453 U.S. at 198 (Congress can limit contributions to multi-candidate political committees to prevent circumvention of contribution limits to candidates).

tion, from buying newspaper space to advocate or oppose a candidate for public office. . . ." Senator Taft responded, "Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal."[77] Michigan's legislature has made the same considered policy choice. On the basis of its decision in *MCFL*, this Court should uphold the constitutionality of the Michigan statute.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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[77] 93 Cong. Rec. 6438 (1947).

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No. 88-1569

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit.

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QUESTION PRESENTED

Whether the government may, consistent with the first amendment, limit campaign expenditures by for-profit corporations that pose the well-recognized potential for corrupting the electoral process, and, if so, whether a state statute that fails to require ideological, non-profit corporations to segregate monies received from for-profit corporations from its funds expended on political campaign speech may nonetheless constitutionally regulate expenditure of such funds.

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INTEREST OF AMICUS[1]

The Center for Public Interest Law is an academic public interest research and advocacy center at the University of San Diego School of Law. The Center has been vitally interested and involved in issues of open government; taxpayer, consumer and voter advocacy; and political, regulatory and systemic reform.

The Center for Public Interest Law has participated in numerous public interest law suits, including the successful defense of Proposition 103, the "Voter Revolt to Cut Insurance Rates" initiative passed by the California electorate in November, 1988. The

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[1] Consent to the filing of this brief has been obtained from counsel to the paries.

California Supreme Court unanimously upheld the measure in May, 1989. The Center is also the named plaintiff in litigation defending Proposition 68, the "Campaign Spending Limits Act" initiative passed by the voters in June, 1988, which raises many of the same issues presented in this case.

The Center also publishes the California Regulatory Law Reporter (the only publication in the Nation that comprehensively covers the regulation of business by state government), educates 40 interns each year in areas of state regulatory procedures, and engages in advocacy projects.

These projects have included drafting the law that provided the California Open Meetings Act with a meaningful civil remedy; drafting a counterpart open meetings law applicable to local governments; the creation by regulatory petition of an entity to represent ratepayers before the California Public Utilities Commission; and the drafting

of and successful lobbying for the first deregulation statute to abolish a major regulatory agency in California in the past twenty years. The Center has particularly advocated the strengthening of open meetings laws and related "sunshine" statutes.

SUMMARY OF ARGUMENT

The expenditure of money, generally speaking, is not speech; rather, it is conduct that facilitates speech. The government may not, however, impose limits on the expenditure of money in such a way that the exercise of first amendment rights is itself unconstitutionally constrained.

Such an expenditure limitation does not unconstitutionally constrain speech, however, where the speech may itself be limited to promote the values of the system of freedom of expression. Such is the case when a forum is naturally limited in such a way that government rationing is justified in order to keep some speakers from monopolizing access to the forum whether due to "unregulated talkativeness" or unregulated expenditure of their wealth.

Mass media -- particularly electronic mass media -- have become the indispensable and central instruments of political speech, and have helped drive the spiraling costs of campaigning for public office. This Court has already recognized that access to these media may be rationed on some basis other than wealth. The failure to do so has made wealth even more important in the political context, and led to subtle and not-so-subtle corruption of the political process, which this Court has recognized may in itself justify some regulation of speech-related conduct.

The impact of concentrated wealth on the political process and on the system of freedom of expression is exacerbated in the context of for-profit corporate expenditures. First amendment interests in protecting such expenditures are at their lowest. The government may therefore regulate or prohibit

entirely corporate political campaign expenditures.

Non-profit, ideological corporations are protected from this power, however, by the first amendment. The Chamber of Commerce, as an ideological non-profit that is not the subsidiary of any profit-making corporation, is entitled to that protection, even if this arguably represents a potentially large loophole through which for-profit corporate funds could leak back into the campaign arena. Legislatures have the means at their disposal to prohibit the funneling of for-profit corporate monies through such ideological associations; the law in question has not utilized such means, however.

ARGUMENT

I. THE REGULATION OF CORPORATE CAMPAIGN EXPENDITURES, NECESSITATED BY THE WELL-RECOGNIZED POTENTIAL FOR CORRUPTION OF THE ELECTORAL PROCESS BY SUCH EXPENDITURES, IS NOT PROHIBITED BY THE FIRST AMENDMENT.

There is no doubt that political speech "lies at the core of the first amendment." Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). And as the Court of Appeals held below, "[t]he Chamber [of Commerce] does not surrender its first amendment rights merely by assuming the corporate form of organization." Michigan State Chamber of Commerce v. Austin, 856 F.2d 783, 787 (6th Cir. 1988) (emphasis added). And see FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238, 263 (1986) (MCFL "does not suddenly present the spectre of corruption merely by assuming the corporate form") (emphasis added); First National Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) ("speech

that otherwise would be within the protection of the First Amendment [does not] lose[] that protection simply because its source is a corporation") (emphasis added).

However, this Court has long recognized the special justifications for regulation of corporate expenditures in the campaign context. "[P]reventing corruption or the appearance of corruption," are, in fact, "the only legitimate and compelling government interests thus far identified for restricting campaign finances." FEC v. National Conservative Political Action Committee ("NCPAC"), 470 U.S. 480, 496-97 (1985). And the necessity of fighting corruption or the appearance thereof has been recognized by this Court as a particularly pregnant concern in the corporate context. "[T]he special characteristics of the corporate structure require particularly careful regulation." FEC v. National Right to Work Committee ("NRWC"), 459 U.S. 197, 209-10 (1982).

As the Court noted in MCFL, 479 U.S. at 257, "the long history of regulation of corporate political activity," is grounded on the need to restrict "the influence of political war chests funneled through the corporate form," NCPAC, 470 U.S. at 501; "eliminate the effect of aggregated wealth on federal elections," Pipefitters Local Union 562 v. United States, 407 U.S. 385, 416 (1972); curb the political influence of "those who exercise control over the large aggregations of capital," United States v. International Union, United Automobile Workers, 352 U.S. 567, 585 (1957); and regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," NRWC, 459 U.S. at 207.

The Court therefore wrote in MCFL that "[r]egulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the

potential for unfair deployment of wealth for political purposes," 479 U.S. at 259, and that the concerns that arise from allowing for-profit corporations to wield their economic clout in the political arena justify departure from the standard first amendment analysis applied to advocacy expenditures by individuals and voluntary associations.

The MCFL Court, however, specifically did not decide the constitutional limits on regulation of political expenditures by traditional profit-making corporations, MCFL, 479 U.S. at 263. In reaching its holding, however, the Court did note that regulations requiring that campaign spending be accomplished out of segregated political action funds were "of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)." 479 U.S. at 259 n.12.

Nevertheless, the NCPAC Court asserted that "[i]n Bellotti, of course, we did not reach, nor do we need to reach in these cases, the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." 470 U.S. at 496.

Amicus respectfully submits that this case presents the Court with an opportunity to re-evaluate both Bellotti's assessment that corporations are entitled to full first amendment protection, and, in particular, Buckley's emphasis on money as a form of speech, 424 U.S. at 16 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."). In short, it is therefore urged that the Court recognize that free speech rights do not

inure to the profit-making corporate form to such an extent as to prohibit legislative proscription and, a fortiori, lesser regulation of such corporations' political campaign expenditures.

A. Money and speech are not congruent.

The expenditure of money is not speech. The act of spending money as one chooses is itself therefore afforded no particular constitutional protection. It is generally accepted that the government may prohibit individuals from spending money to purchase narcotic or haleucenogenic drugs; firearms; the services of prostitutes; slaves; or votes. Despite the first amendment right to possess and read obscene pornography, Stanley v. Georgia, 394 U.S. 557 (1969), individuals may nonetheless be prohibited from spending money in pursuit of such activities. Paris

Adult Theatre I v. Slayton, 413 U.S. 49 (1973) ("A man may be entitled to read an obscene book in his room . . .. But if he demands a right to obtain the books and pictures he wants in the market . . . then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.") (emphasis omitted).

Of course, the giving or spending of money is an action that, like many actions, can be imbued with expressive conduct. See, e.g., Texas v. Johnson, 57 U.S.L.W. 4770, 4772 (June 20, 1989) (flag burning); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing of armbands); United States v. O'Brien, 391 U.S. 367, 376 (1968) (burning of draft card); Schacht v. United States, 398 U.S. 58 (1970) (wearing of military uniforms).

The giving of money to a cause or candidate, including the amount given, can be an expressive act. But the amount given or spent does not in and of itself necessarily indicate intensity of support -- it might merely reflect the giver's ability to pay. Cf. Buckley, 424 U.S. at 21 ("At most, the size of the contribution provides a very rough index of the intensity of . . . support . . .."). Thus, neither does the spending or giving away of money in itself constitute speech, nor do limitations on the level of expenditures (at least beyond the initial quantum expressing support) pose any significant infringement on free expression in terms of whatever expressive value inheres in the actual giving or expending of the money.

While government clearly cannot suppress the propagation of political views, see, e.g., Brown v. Hartlage, 456 U.S. 45 (1982) (first amendment has its "fullest and most

urgent" application in the case of regulation of the content of political speech); Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972), it is not at all apparent that that principle applies "to the expenditure of money to propagate political views, rather than to the propagation of those views unaccompanied by the expenditure of money." NCPAC, 470 U.S. at 493. Cf. O'Brien, 391 U.S. at 376-77 (regulation of speech-related conduct is constitutional if it serves important governmental interest and if that interest is unrelated to suppression of speech); Clark v. Community for Creative Non-Violence, 468 U.S. at 293.

Any first amendment limitation on the regulation of campaign expenditures and contributions, then, must be found in the extent to which the limitation of monetary expenditures constrains constitutionally protected speech made possible by those expenditures.

B. Expenditures may be limited where the speech that such expenditures facilitate may itself be limited -- irrespective of its content -- because of inherent limitations of the forum or system of free speech.

In some instances prohibiting the spending of money would clearly foreclose constitutionally protected opportunities for speech and thus run afoul of the first amendment. As the Court noted in Buckley,

> virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies necessitate hiring a hall and publicizing the event.

424 U.S. at 19. And see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (state may not impose additional tax on paper and ink required to produce newspapers).

Thus, first amendment actors must be allowed to pay for the ink for their presses, the paper for their handbills, even the administrative overhead for their first amendment activities, see Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984). But clearly not all limitations on individuals' ability to expend money to propagate their views unconstitutionally limits speech, for two reasons: (i) the expenditure limitation may have negligible, if any, effect on the exercise of the first amendment right, or (ii) the exercise of the first amendment right itself may conflict with the requirements of the system of freedom of expression and may thus properly be limitable.

An example of the first situation would be a campaign expenditure limit of $1 million. Virtually no person or entity (other than the official campaign organization itself) is likely to spend $1

million on campaign-related speech. But see Cox, Constitutional Issues in the Regulation of the Financing of Election Campaigns, 31 Cleve. St. L. Rev. 395, 395 (1982) ("The first massive infusion of special interest money into a federal election campaign occurred in 1832 when Nicholas Biddle and the Bank of the United States spent $800,000 -- $1,000,000 in present-day dollars in a vain effort to prevent the reelection of Andrew Jackson.")

The lower the ceiling the more pressing the question whether, and to what extent, the ability to speak is actually being impinged by the limitation. This is a factual question answerable only by reference to the actual workings of the real world. Cf. NCPAC, 470 U.S. at 493 ("[F]or purposes of presenting political views in connection with a nationwide Presidential election, allowing the presentation of views while forbidding the expenditure of more than $1,000 to

present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system").

In those instances in which a restriction on spending is found actually to curtail the ability to speak, there may independently be governmental power to limit the volume of expenditure because of power to limit the "volume" (or amount) of speech. As Alexander Meiklejohn has observed, there is a difference between abridging the "freedom of speech" -- which is forbidden -- and abridging speech, which is in some instances permissible. A. Meiklejohn, Free Speech and Its Relevance to Self-Government 19 (1948).

As Professor Emerson noted, while government may not regulate "expression that is thought to harm other social interests," government may regulate speech to "promote the goals of the system" of free expression itself, including improvement in the "quality

and meaningfulness of expression." T. Emerson, The System of Freedom of Expression 633 (1970). In Emerson's view, the question is "whether there has been an 'abridgment' of freedom of expression," and the answer is "framed in terms of accomodation of interests within the system," meaning "promotion rather than deterence of expression." Id. at 629 (emphasis added).

In short, neither Emerson, Meiklejohn, nor Amicus here would assert that speech could be limited to improve its "quality" by eliminating speech that the government regarded as of inferior ideological or intellectual content, for this involves the abridgment of speech on the basis of values derived outside the system of free expression itself. However, government may, in proper instances, act as a "traffic cop" to improve the quality of the functioning of the system, much as government keeps traffic flowing through an intersection.

Thus, Meiklejohn has observed that "[t]he First Amendment . . . is not the guardian of unregulated talkativeness." Meiklejohn, supra, at 25. Thus, in Meiklejohn's famous example, speech may be limited at a town meeting in order to ensure other speakers their right to speak. Similarly, Judge Skelley Wright has asserted that

> [e]xpenditure limits and other curbs on campaign finance practices are analogous to rules of order at a town meeting, enforced so that the deliberative process is not distorted. The first amendment does not permit curbs on general discussion of political, economic, or social controversies. But, like the loud mouth and long talker at the town meeting, untrammeled spending during an election campaign does not serve the values of self-government, nor can it lay claim to first amendment protection.

Wright, Money and the Pollution of Politics: Is the First Amendment an Obtsacle to Political Equality?, 82 Colum. L. Rev. 609, 639 (1982).

This does not mean that the government could, without more prohibit repetitive speech -- a campaign expenditure level would not be acceptable simply because it is high enough to let one say what he or she has to say once, but no more. In the absence of a compelling governmental interest -- or a competing interest springing from the system of free expression itself -- the government may not regulate "talkativeness" or the speaker's right to repeat his message as much as he likes or attempt to reach as many listeners as he wishes.

Thus, such limitation of speech must be predicated upon the "the forum['s being] limited by physical, technological, or economic factors." Wright, supra, 82 Colum. L. Rev. at 640. The fact that one individual may possess greater skills or resources in putting across his message does not suffice to show such an inherent limitation in the forum as to require government interference

in rationing access to the forum. Rather, the nature of the forum itself must require the rationing.

In the campaign context, it can be argued that there is no inherent rationing required because each citizen is as free as the next to spread her views through speaking, handbilling, and other first amendment actions; thus, the greater ability of those with greater resources to attain their goals through the free market of expression is constitutionally irrelevant. See, e.g., Buckley, 424 U.S. at 39-51. But this ignores the realities of modern campaigns.

C. Reasonable expenditure limits are required to ration access to the most expensive and effective means of political speech on some basis other than wealth.

As the per curiam opinion in Buckley acknowledged, "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." Buckley, 424 U.S. at 19 (emphasis added). And see NCPAC, 470 U.S. at 493 ("The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements."). And, as this Court has recognized, access to these expensive and indispensable instruments of effective political speech -- particularly television -- by their nature must be

rationed, and ought properly be rationed on some basis other than mere wealth.

In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), this Court upheld the constitutionality of the FCC "fairness doctrine" requiring broadcasters to give free air time, in specific instances, to those with opposing viewpoints. The Court recognized that this limitation on the broadcaster's right to use as he saw fit the broadcast time he "owned" would "enhance rather than abridge the freedoms of speech and press." Id. at 375. This was because of the "scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views." Id. at 400.

In short, as the airwaves are a physically or technologically limited forum, regulation that adds to the stock of

expressed attitudes on a more equal basis is permissible. It is, after all, "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." Red Lion, 395 U.S. at 390.

Thus, in rejecting a rule that would compel broadcasters to air paid messages, the Court in CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), found that a right to spend as much money as one wanted to "speak" on television would be "so heavily weighted in favor of the financially affluent, or those with access to wealth" that the system of freedom of expression "would scarcely be served." Id. at 123. "[T]he views of the affluent could well prevail over those of the others," Chief Justice Burger observed for the Court, "since they would have it within their power to purchase time more frequently." Id.

This Court has thus found that the right to spend money to facilitate speech is not unlimited; rather, where access to the relevant forum is itself limited, government may ration that access on a content-neutral basis other than wealth. "Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." Red Lion, 395 U.S. at 387.

A legislative body could well find that, as this Court itself has stated, expensive mass media -- particularly the electronic media -- are the "indispensable instruments of effective political speech" central to campaign communication today, Buckley, 424 U.S. at 19 (emphasis added), and that

rationing of access to such media is essential to preserving the integrity of the political process and the first amendment. And as major campaign contributors primarily "spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements," NCPAC, 470 U.S. at 493 (emphasis added), a rational legislature could today conclude that the valid rationing of access to mass media in the campaign context and the limitation of campaign expenditures are essentially synonymous.

In short, the legitimate protection of "the system of freedom of expression" in the dominant fora of the modern political campaign essentially requires regulation of campaign expenditures. Thus, legislative limitations on political campaign expenditures, so long as reasonable within the foregoing analytic framework, ought to carry a fair presumption of constitutionality

under the first amendment. Accord T. Emerson, The System of Freedom of Expression 639-40 (1970) (campaign limits permissible because they "are directed to a limited end and deal with a limited situation").

D. The constitutionality of government rationing of access to effective but limited fora on some basis other than wealth is reinforced by the need to reduce the corrupting effects of money on the political process.

That the de facto rationing of access to the most effective means of communication in modern campaigns should not be carried out on the sole basis of access to large agglomerations of money is bolstered by this Court's long-held conviction that "preventing corruption or the appearance of corruption" constitute a legitimate and compelling governmental interest in the regulation of campaign finance. NCPAC, 470 U.S. at 496-97.

In NCPAC, the Court objected, however, that "precisely what the 'corruption' may consist of we are never told with assurance." 470 U.S. at 498. The corruption of the political process at issue, of course, is not outright bribery -- but open bribery is not the only form that corruption may take.

Money, in the popular imagination and in fact, appears to be the largest, if not the single, determinant of electoral success. As Michael S. Berman, a long-time national political operative, has commented, "[i]n his experience as a campaign organizer, he had always operated under the premise that 'if I had enough money, I can do it [win the election]'." Comments, Special Forum on Proposed Reforms in Campaign Financing, 3 J.L. & Pol. 419, 500 (1986). And as two esteemed federal judges have observed, the FEC has reported that a two-to-one expenditure advantage over one's opponent translates into a 93% probability of

election. See, Wald, Two Unsolved Constitutional Problems, 49 U. Pitt. L. Rev. 753, 754 (1988); Wright, Money and the Pollution of Politics, supra, 82 Colum. L. Rev. at 622 (1982).

The amount of money required to obtain public office, meanwhile, is sky-rocketing. Candidates for the Senate spent five times as much, and House candidates four times as much, in 1985-86 as a decade earlier. See M. Barone & G. Ujifusa, The Almanac of American Politics: 1988, at 1363 (1987). The result has, not unpredictably, been the declining relevance of the small, individual contributor. Contributions of $100 or less fell from 38% of the financing of U.S. Senate races in 1974 to only 23% in 1986; for House races, the drop off is even more dramatic, falling from 46% to only 13% in the last election cycle. Conlon, The Declining Role of Individual Contributions in Financing

Congressional Campaigns, 3 J.L. & Pol. 467, 471, 476 n.4, 479 (1986).

The role of PAC's has concommitantly grown; PAC contributions have risen from only $12 million in 1974 to $132 million in 1986 and '87. Cong. Res. Svce., Report on Campaign Financing 6 (Update, July 2, 1987). While some of these PAC's still represent "mechanisms by which large numbers of individuals of modest means can join together," NCPAC, 470 U.S. at 494, PAC's are by no means purely, or even predominantly, "ideological mutual funds." PAC's are, rather, the predominant means by which large aggregations of corporate wealth are injected into the electoral process today. In fact, the vice president for "political education" of the Business-Industry Political Action Committee has asserted that "[i]f anything, corporate America has been timid in the full exercise of its power to make campaign contributions and influence candidates."

Budde, Business-Related Political Action Committees -- A Permanent Force After One Decade, 3 J.L. & Pol. 449, 453 (1986).

The individuals or entities that can supply (whether indirectly through the official campaign apparatus, or directly through his own expenditures on behalf of the candidate) the large cash infusions needed to compete for office today are the candidate's and officeholder's lifeblood. Thus, the point is not that "candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs," NCPAC, 470 U.S. at 498, but that candidates and elected officials must, in general, "alter or reaffirm their . . . positions on issues in response to" the availability of large aggregations of money, if they wish to remain competitive.

As Professor Freund has observed, such large contributors "are operating vicariously

through the power of their purse, rather than through the power of their ideas, and . . . I would scale that relatively lower in the hierarchy of First Amendment values." Freund, Commentary in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 74 (Citizens' Research Foundation Study No. 18) (1971).

The insidious effects of large concentrations of money in our politics are not just that this money in large measure predestines election results, thereby predisposing politicians toward the positions of the wielders of such sums, but also that the positions taken by candidates -- at least, those who run to win and not just to state their principles -- are largely constrained by the preferences not of the electorate as a whole but rather of the purveyors of the necessary campaign finances. See, e.g., Cox, Constitutional Issues in the Regulation of the Financing of Election

Campaigns, supra, 31 Cleve. St. L. Rev. at 399-401.

We should certainly be concerned where the range of positions presented to the electorate is constrained, in no small degree, by those entities with large sums of money available, cf. Bullock v. Carter, 405 U.S. 134 (1971) (large candidate filing fee unconstitutionally limits voter choice to those views supported by substantially monied voters); Lubin v. Panish, 415 U.S. 709 (1974). This is even more true where those exercising this inordinate influence are not even themselves entitled to vote but are, rather, artificial and purely commercial "persons."

E. Rationing access to effective but limited campaign fora on some basis other than wealth is especially justified when applied to corporations organized for profit.

The use of the corporate form to collect money for profit and then expend it in the political campaign context is particularly problematic. As the Court recently asserted,

> concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.. . . Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace.. . . The reasources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 257-58.

Thus, the argument for full first amendment protection of corporate political campaign expenditures has already been severely undercut on several fronts. The well-established doctrine of commercial speech, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), in fact provides lessened first amendment protection not for commercial speech but for commercial speakers:

> The same substantive speech (e.g., wage rates, product quality, or business patronage) becomes fully-protected, non-commercial speech when spoken by someone other than the commercially concerned entity.

Compare Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may bar lawyer solicitation for pecuniary gain), with In re Primus, 436 U.S. 412 (1978) (state may not normally bar legal organization from soliciting in furtherance of "political and ideological goals of the association"); and

compare Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (government may bar commercial circulation of birth control materials and brochure advocating their use) with Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot proscribe dispensing of birth control materials or advocacy of their use). And see NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Thus, one's status as a commercial actor has already been accepted as justification at least in part for lessened first amendment protection.

That for-profit corporations have lessened first amendment rights is certainly not a novel proposition. In Bellotti, after noting that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory incrimination" -- or "equality with individuals in the enjoyment of a right to privacy," -- "are unavailable to corporations and other organizations because

the 'historic function' of the particular guarantee has been limited to the protection of individuals," 435 U.S. at 779 n.14 (per curiam opinion) (citations omitted), the Court wrote that "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision. Id.

As Justice White noted in his Bellotti dissent, though, "what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech." Id. at 304-05 (White, J., dissenting) (citing T. Emerson, Toward a General Theory of the First Amendment 4-7 (1966); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)). Indeed, the Court has long recognized in the antitrust context that

the government may curtail business corporations' speech and associational rights so as to preclude combining expenditures or any aspect of operations unless trade is not restrained, or to forbid even basic or indirect communication on matters of price. See, e.g., United States v. Container Corp., 393 U.S. 333 (1969).

The first amendment question at issue here, then, "is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process." Bellotti. at 809. Since the state "indirectly assist[s] the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities[, s]uch

expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." Id. at 810. And see id. at 825-26 (Rehnquist, J., dissenting).

Limitiations on corporate political speech, moreover, do not infringe on the ability of any individual to participate in campaign speech -- the true "core value" of the first amendment -- because any corporate investor, owner, or manager is free to use his or her own resources for first amendment purposes as he or she chooses. A corporation, after all, is not a real person with any right to participate in the electoral system; it is a legal device for the promotion of enterprise through the pooling of resources by any number of individuals -- all of whom are free to use their resources, including those they gain from their corporate investments, for expressive purposes.

As noted at the outset, moreover, the level of political expenditure relates only very tenuously to any expressive content beyond simply the initial marginal act of spending. The incongruity between the expressive content of the expenditure and the pure economic value of the expenditure is exacerbated in the for-profit corporate context, however, by the fact that the amount of money available to traditional, profit-making corporations does not function, as this Court has acknowledged, as any more than "a rough barometer of public support for" their ideas, see MCFL, 479 U.S. at 258.

The particular merit, at least for first amendment purposes, of the ideological corporation, in contrast, is that its capital is accumluated specifically for the purpose of communicating the views in question. For-profit coporate money may, instead, in fact be used to espouse views contrary to those of the shareholders or workers who made

the funds available, and who have no realistic ability to protest or control such uses, see NRWC, 459 at 207. There is thus even less reason to suppose that the first amendment protects the for-profit corporation against restrictions on transferring its unique clout in the economic marketplace directly to the political marketplace.

In sum, the protections of the first amendment are at their lowest in the context of political expenditures by a purely commercial corporate entity. The potentially corrupting effect on the political process of political expenditures is also at its highest. Moreover, the legislative interest in limiting politcal campaign expenditures in the reality of the modern campaign environment actually itself furthers a valid and compelling first amendment objective of providing adequate speech for all speakers by rationing access to the most "indispensable" political fora. This Court should therefore

uphold legislative proscription or limitation of corporate political campaign expenditures.

II. THE MICHIGAN LEGISLATURE HAS NOT EXERCISED ITS POWER TO BAN ALL CORPORATE FUNDS FROM ENTERING THE POLITICAL MARKETPLACE, BUT RATHER HAS SIMPLY BARRED ALL NON-PAC CORPORATE EXPENDITURES; HENCE, EXPENDITURES BY THE CHAMBER -- A NON-PROFIT IDEOLOGICAL CORPORATION PROTECTED UNDER MCFL -- ARE LAWFUL.

In the foregoing Section, Amicus suggested that corporate funds can be completely banned from injection into a political campaign.

As noted, however, the corporate form is not the determinant eo ipso of when electoral integrity concerns are sufficient to overcome traditional first amendment protection; "voluntary associations" and ideological corporations may not and should not be treated in the same way as profit-making enterprises. "Voluntary political

associations do not suddenly present the spectre of corruption merely by assuming the corporate form." MCFL, 479 U.S. at 263. For example, the Federal Election Commission permits a political committee to incorporate "for liability limitation purposes only." 11 C.F.R. Sec. 114.12(a).

"Undoubtedly, as this Court has recognized, see NAACP v. Button, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits." Bellotti, 435 U.S. at 805 (White, J. dissenting).

Thus, "voluntary associations," whether incorporated or not, are afforded -- as are individuals -- full first amendment protection in expenditures constituting political advocacy. MCFL, 479 U.S. at 263. Traditional, profit-making corporations, however, can be subject to stringent regulation of campaign expenditures because of the serious threat to "the integrity of the marketplace of political ideas" raised by "the corrosive influence of concentrated corporate wealth." Id. 257. "As we said in California Medical Ass'n v. FEC, 453 U.S. 182 (1981), the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" NRWC, 459 U.S. at 210.

The Court of Appeals -- noting that "[t]he Chamber is not a sub-corporation established by a parent corporation," Austin, 856 F.2d at 789 -- found that the

Chamber of Commerce was a "voluntary political association," 856 F.2d at 788, and therefore could not be subject to corporate campaign expenditure restrictions.

Appellants and supporting amici argue that this finding opens up a potentially massive loophole in corporate campaign contribution legislation, allowing such organizations to do an end-run around the distinction between corporations formed for ideological purposes and those formed as profit-making enterprises. It is argued that allowing ostensibly ideological, non-profit corporations formed primarily by for-profit corporations to qualify for full first amendment protection equally with non-profits and voluntary associations not associated with the profit-making sector would vitiate the "different forms of regulation" needed to address "the 'differing structures and purposes' of different entities" in the context of "protect[ing] the integrity of the

electoral process." National Right to Work Comm., 459 U.S. at 210.

Such business-affiliated non-profit, ideological corporations do indeed constitute a large hole in any comprehensive attempt to eliminate corporate funds from the political environment. However, as this Court has recognized, such an exemption is required by the first amendment. MCFL, supra. Nonetheless, it is a hole that, if not closeable, is at least bridgeable.

The government may not only prohibit corporations from directly injecting money into the political campaign process; it may also prohibit corporations from indirectly funneling money into the process through non-profit, ideological corporations. While such ideological or voluntary associations cannot be denied the exercise of their first amendment rights simply because of their receipt of corporate funds in other contexts, cf. Perry v. Sinderman, 408 U.S. 593 (1972);

Speiser v. Randall, 357 U.S. 513, 526 (1958), they may be required to segregate such funds from their political activities.

For instance, ideological corporations or voluntary associations can be required to maintain segregated accounts to demonstrate that corporate funding of those organizations do not subsidize political campaign activities. Federal regulations currently provide that federal political committees that cannot accept business or labor contributions may nonetheless establish non-federal accounts that accept such funds for state campaigns, where permitted by state law. See 11 C.F.R. Sec. 102.5.

Similarly, the Internal Revenue Code prohibits private foundations from making grants earmarked for lobbying, but allows such foundations to provide general support grants to public charities that do in fact lobby but requires such charities to demonstrate that their lobbying activities

were not subsidized by the foundation grants. See 26 C.F.R. Sec. 53.4945-2.

In short, segregation of funds is already a commonly applied and easily enforced principle. It allows the government to address the valid concern with corporate contributions somehow "leaking" into electoral advocacy. But, as corporate gifts are often vital to a non-profit, ideological, or voluntary organization's charitable or civic activities unrelated to electoral politics, such segregation-of-funds regulations allow these organizations to continue the first amendment activities central to their existence as well as their constitutionally protected electoral advocacy. In this way, the first amendment concerns prompting corporate campaign expenditure limitations, see supra Section I, can be advanced without mandating that voluntary and ideological organizations choose between alternative first amendment

activities, both of which they are constitutionally permitted to pursue.

However, this the Michigan legislature has not done. The Michigan Campaign Finance Act prohibits contributions and expenditures by corporations, except through segregated PAC accounts; such a restriction, under MCFL, cannot apply to non-profit, ideological corporations, which the Court of Appeals found to include the Michigan Chamber of Commerce. The Act contains no separate provision such as those discussed above, requiring a non-profit such as the Chamber to segregate funds originating from corporate sources and those to be used for campaign advocacy, however.

The Chamber was thus entitled to expend its funds on campaign advocacy. This case requires the careful balancing of, on the one hand, the state's power to protect its democratic institutions from domination by large aggregations of wealth through the

limitation or proscription of corporate campaign expenditures; and, on the other hand, the constitutional protection of non-profit, ideologically based expression and giving through the corporate format. The result in the Court of Appeals therefore ought to be affirmed.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

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No. 88-1569

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OCTOBER TERM, 1989

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Appellants,
v.
MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation,
Appellee.

On Appeal from United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION OF REALTORS, AND THE AMERICAN INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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v.

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE NATIONAL ASSOCIATION OF REALTORS, AND THE AMERICAN INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

The American Medical Association ("AMA") was established in 1847 to promote the art and science of medicine and the improvement of public health. The AMA is an incorporated not-for-profit professional association without stockholders. It has approximately 295,000 individual members, including practicing physicians, student members and physicians involved in teaching, research and related public health occupations. The AMA, which is supported primarily through the payment of dues by its members, engages in speech on a variety of public and

political issues of concern to the medical profession. The AMA has no corporate members, although some individual physicians pay their AMA dues through their professional corporations or have some or all of their dues paid by hospitals, medical clinics or other corporate employers.

The AMA has established the American Medical Political Action Committee ("AMPAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of over $5 million. Of that amount, AMPAC spent $836,705 on independent expenditures.

The National Association of Realtors ("NAR") is an incorporated not-for-profit professional association established in 1908 to promote and advocate the highest degree of professional competence and integrity in the rendition of real estate services. The NAR is comprised of approximately 775,000 individual members engaged in all phases of the real estate business. None of the NAR's members are business corporations, although some individual members may have some or all of their dues paid by their corporate employers. The NAR engages in speech on a variety of public and political issues of concern to real estate professionals.

The NAR has established the Realtor's Political Action Committee ("RPAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of approximately $6 million. Of that amount, RPAC spent $1,307,996 on independent expenditures.

The American Insurance Association, Inc. ("AIA") is an incorporated not-for-profit national trade association established in 1964 to promote and advocate the interests of property-casualty insurance companies. The AIA has 204 member companies which employ over 130,000 persons. It receives membership dues only from its corporate members and engages in speech on a variety of political and public policy issues on their behalf.

The AIA has established the American Insurance Association Political Action Committee ("AIA-PAC"), a separate segregated fund which in 1987-1988 had total receipts and expenditures of approximately $74,000. AIA-PAC did not make any independent expenditures during that time period.

The AMA, NAR and AIA (like the Michigan State Chamber of Commerce) are exempt from federal taxation under Section 501(c)(6) of the Internal Revenue Code. 26 U.S.C. § 501(c)(6). The Internal Revenue Service has adopted a regulation which defines a Section 501(c)(6) organization as

> an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit . . . . Thus, its activities should be directed to improvement of business conditions in one or more lines of business as distinguished from the performance of particular services for individual persons,

Treas. Reg. § 1.501(c)(6)-1; see *Nat'l Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 481-482 (1979). Consistent with this regulation, the purpose of AMA, NAR and AIA is to promote the interests of their members and not to engage in any regular business for profit, although AMA and NAR earn some income through certain unrelated business activities consistent with the interests of their members and the Internal Revenue Code.[1] Their primary activities include professional education, collection of information, research, analysis, and advocacy of political and policy ideas and programs that advance the common interests of their

[1] For example, the AMA publishes a variety of medical and scientific journals for its members and the medical and scientific community, and it earns income from the sale of advertising in these journals. The NAR engages in similar activities. The AIA does not earn any unrelated business income.

members. Because the conduct of *amici* directly is affected in many ways by regulations similar or identical to the Michigan Act at issue in this case and *amici* have significant experience with campaign funding regulations, *amici* are filing this brief to present their views on these issues to the Court.[2]

At issue in this case is the constitutionality of a Michigan statute which limits the ability of all corporations, including not-for-profit, incorporated associations and advocacy groups, to engage in political speech through "independent expenditures." *Amici* engage in independent expenditure activities related to candidates for federal office, but are constrained in doing so by provisions of the FECA which are substantially identical to those of the Michigan statute. Thus *amici* seek affirmance of the decision below in order to more clearly establish the constitutional dimensions of their First Amendment freedom to engage in such political speech.

Amici assert that this result is warranted because, while the Michigan statute at issue directly infringes protected speech and associational rights, it is not narrowly tailored to achieve a compelling state interest. In particular, the statute's broad and indiscriminate application to all corporations, including those such as *amici*, is unrelated to whatever legitimate objectives may be served by limitations on campaign contributions by business corporations.

STATEMENT AND BACKGROUND

1. At issue in this case is the constitutionality of statutory limits on the ability of not-for-profit, incorporated associations and advocacy groups to engage in political

[2] *Amici* have obtained consent to the filing of this brief from all parties. Copies of the parties' letters of consent have been filed with the Clerk of the Court.

speech through "independent expenditures." The statute at issue, the Michigan Campaign Finance Act ("Act"), 1976 Mich. Pub. Acts 388, Mich. Comp. Laws Ann. ("MCL") § 169.201, *et seq.* (West 1989 Supp.), prohibits "a corporation" from making any "expenditure" in connection with an election campaign for state office. MCL § 169.254(1). An "expenditure" includes any "payment" or other contribution of goods, services or facilities in "assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question." MCL § 169.206(1).[3] The limitation on corporate expenditures also prohibits any payment or transfer of "anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage or defeat of a ballot question." MCL § 169.206(2). Thus, a corporate expenditure made for the purpose of communicating on issues of public policy is permissible only if it does not support or oppose a candidate or ballot issue by name or by "inference." MCL § 169.206(3)(c).

The Act permits the use of corporate funds for the "establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes." MCL § 169.255(1). Such "separate segregated funds" ("political action committees" or "PACs") are limited in the amount that they may contribute to a candidate (MCL § 169.252), unless the expenditures are "independent." Mich. Dept. of State, Bureau of Elections, Manual for Independent Political and Ballot Question Committees, 24. An "expenditure" is "independent" if it is "not made at the direction of, or under the control of, another person" and if it is not made to a "committee." MCL §§ 169.209(1); 169.203(4).

[3] Corporations also are prohibited from making any "contribution" to a candidate for office or a candidate's campaign committee. MCL § 169.254(1). A "contribution" consists of any payment, pledge, gift or promise to pay anything of value to any "person" "for the purpose of influencing" an election. MCL § 169.254(1).

Contributions to Michigan political action committees may be solicited only from individual members, stockholders, officers, directors and executive and administrative employees of the corporation that establishes the PAC. MCL § 169.255(2) & (3).[4] Political action committees also must register with the Michigan Department of State either as an "independent committee" or a "political committee." The dollar amount of the contributions made by Michigan PACs is limited based on this registration. MCL § 169.252. In addition, such committees are subject to detailed recordkeeping and reporting requirements. See, *e.g.*, MCL §§ 169.224-226, 169.228, 169.231, 169.235.[5]

2. The Federal Election Campaign Act ("Federal Act" or "FECA") of 1971 (2 U.S.C. §§ 431 *et seq.*) is similar in many respects to the Michigan statute. The Federal Act makes it unlawful for any "corporation . . . , or any labor organization, to make a contribution or expenditure in connection with" any federal election. 2 U.S.C. § 441b (a). The definition of "expenditure" includes the provision of anything of value "for the purpose of influencing any election for Federal office" (2 U.S.C. § 431(9)(A)(i)), but excludes the contribution of money or services for the "establishment, administration, and solicitation

[4] The PAC at issue in this case—the Michigan State Chamber Political Action Committee—may *not* solicit funds from the PACs of the corporations that are members of the Chamber of Commerce. Op. No. 5344, Att'y Gen. of Mich. 549 (July 20, 1978). It may solicit contributions from individual members, executives and administrative employees of the Chamber of Commerce, and from the executive and administrative employees of its member companies. MCL § 169.255(2) and (3).

[5] Under the Michigan Act, *any* "person, other than a committee, who makes an independent expenditure . . . which totals an amount of $100.01 or more in a calendar year shall file a report of the independent expenditure . . . ." MCL, § 169.251. Committees, which are exempted from this provision, are subject to separate reporting requirements.

of contributions to a separate segregated fund [*i.e.*, PAC] to be utilized for political purposes." 2 U.S.C. § 441b (b)(2)(C). Federal PACs—like their Michigan counterparts—are subject to strict limits on the amount of contributions (but not independent expenditures) that they may make. 2 U.S.C. § 441a. See *Buckley* v. *Valeo*, 424 U.S. 1, 39-59 (1976) (invalidating the limits on independent expenditures).

An " 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17). The paid advertisement at issue in this case would be an "independent expenditure" if made about a candidate for Federal office. Independent expenditures must be made "without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate," and they may not be made "in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); see 11 C.F.R. § 109.1(b)(4).

The regulations and advisory opinions issued by the Federal Election Commission ("FEC") pursuant to FECA narrowly construe the definition of "independent expenditure." For example, virtually any consultation with a candidate or his staff may result in a subsequent expenditure being deemed to be not "independent." FEC Advisory Opinion 1984-30, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5775 (August 6, 1984). In many circumstances, a PAC's employment of a consultant or vendor (*e.g.*, an advertising or public relations agency) in connection with an expenditure advocating the election or defeat of a clearly identified candidate may give rise to a presumption that the expenditure is not "independent" if that consultant or vendor has worked for the candidate or the political party with which the candidate is affiliated. See FEC Advisory Opinion 1979-80, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5469 (March 12, 1980).

"Every person" who makes independent expenditures in excess of $250 in a calendar year is subject to the reporting requirements of the Federal Act. 11 C.F.R. § 109.2.[6]

An expenditure that is not "independent" will be counted as an "in-kind contribution" subject to the contribution limits of FECA. 2 U.S.C. § 441a. These contribution limits are more strict than Michigan's limits—generally $1000 or $5000 per election. Expenditures which exceed such limits, but do not meet the definition of independent expenditure, are subject to significant civil penalties. 2 U.S.C. § 437g(a)(5)(A). Knowing and willful violations may result in a doubling of the civil penalty or the imposition of criminal penalties. 2 U.S.C. § 437g(a)(5)(B); 2 U.S.C. § 437g(d)(1)(A).

Federal PACs of incorporated associations, like their counterparts under Michigan law, may solicit contributions from the association's executive and administrative employees and their non-corporate members. 2 U.S.C. § 441b(b)(4)(A)(i), (4)(D). The PACs of corporate members of an association may not be solicited (11 C.F.R. § 114.7(j)), but the executive or administrative employees of member corporations may be solicited if the association complies with detailed regulatory requirements. 11 C.F.R. § 114.8(c), (d), (e) and (f).

[6] The FEC also has held that an "expenditure" for a mass mailing advocating the election of a candidate, in which the committee would receive individual contributions in response to the mailing and pass them along to the candidate, would not be counted as an independent expenditure but would count as an in-kind "contribution." According to the FEC, because the committee would "gather[] and transmit[]" the checks to the candidate, "the acceptance of the checks by the candidate constitutes acceptance of the costs incurred by [the committee] in connection with the solicitation" and those costs must be counted as an in-kind contribution. See FEC Advisory Opinion AO 1980-46, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5508, at 10,589 (June 25, 1980).

In particular, the association PAC must receive written "separate and specific approval" from each member corporation each year before it may solicit the employees of that member. 11 C.F.R. § 114.8(c). A member may provide such permission only to one association per year. If permission is granted, the association PAC may solicit only the employees of the corporate entity which is a member—not the employees of affiliate and subsidiary corporations. 11 C.F.R. § 114.8(f).[7] Finally, Federal PACs, like their Michigan counterparts, are subject to detailed organizational, record-keeping and reporting requirements. 2 U.S.C. §§ 432-434; see *FEC* v. *Massachusetts Citizens for Life* ("MCFL"), 107 S.Ct. 616, 625-626 (1986).

ARGUMENT

A. The Ban On Independent Expenditures As Applied In This Case Constitutes An Infringement Of Free Speech Which Is Entitled To The Highest Degree Of First Amendment Protection

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). Thus, the "First Amendment affords the broadest protection to such political expression." *Id.*; see *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment also guarantees "freedom to associate with others for the common advancement of political beliefs and ideas." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975) (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 56 (1973)); see *NAACP* v. *Button*, 371 U.S. 415 (1963).

[7] Permission generally is difficult to obtain and some associations have suffered a decline in contributions since 1976 when this provision was enacted. See *Bread Political Action Comm.* v. *FEC*, 635 F.2d 621, 637 (7th Cir. 1980) (Pell, J. dissenting).

Restrictions on independent expenditures in support of, or opposed to, particular candidates or ballot issues "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley*, 424 U.S. at 39 (1976) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968)); see *FEC* v. *Massachusetts Citizens for Life ("MCFL")*, 107 S.Ct. 616, 624 (1986); *FEC* v. *Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment"). The "primary effect" of independent expenditure limitations is "to restrict the quantity of campaign speech" by the persons subject to the limitations. *Buckley*, 424 U.S. at 39.[8] Such limitations also "impinge on protected associational freedoms" (*Buckley*, 424 U.S. at 22), particularly where the organization is formed, at least in part, for the specific purpose of advocating its members' views on issues of public importance.[9]

Section 54(1) of the Michigan Campaign Finance Act (MCL § 169.254(1)) flatly prohibits any independent ex-

[8] Because the knowledge of which candidates are supported by a particular organization can be important to voters, restrictions on independent expenditures also infringe upon "the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); see also *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).

[9] The "original basis" for recognizing the protection of associational rights was to protect the ability of individuals to effectively band together to "amplif[y] the voice of their adherents." *Buckley*, 424 U.S. at 22 (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). A restriction on the rights of an association to advocate its political views is "simultaneously an interference with the freedom of [its] adherents." *Buckley*, 424 U.S. at 22 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)). Congress recognized the importance of these associational rights and sought to protect them when it adopted the statute regulating corporate political contributions. 2 U.S.C. § 441b; *Pipefitter Local No. 562* v. *United States*, 407 U.S. 385, 431 n.42 (1972).

penditure by a corporation (*supra*, 5) and constitutes a direct infringement of protected speech and associational rights. J.S. App. 9-10. The State does not dispute that the Act results in such an infringement (see Juris. Stmt. 13) and, in fact, the ban on expenditures imposed in this case has a substantial impact on the speech of the appellee and similarly situated parties. See *MCFL*, 107 S.Ct. at 626, 629.

B. This Court Consistently Has Invalidated Restraints On Independent Expenditures

Where, as here, a statutory provision directly and substantially burdens fundamental constitutional rights—such as the First Amendment rights of speech and association—the statutory provision is "presumptively unconstitutional." *Harris* v. *McRae*, 448 U.S. 297, 312 (1980); *Mount Healthy City Board of Educ.* v. *Doyle*, 429 U.S. 274 (1977). In order to uphold the ban on independent expenditures, the state bears the burden of demonstrating that the statute, as applied, is (1) necessary to achieve a compelling state interest, *Williams* v. *Rhodes*, 393 U.S. at 31; *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841-42 (1978); *Bellotti*, 435 U.S. 765, 786; and (2) narrowly tailored to serve that interest, *id.* at 793-95; *Landmark*, 435 U.S. at 841-42. This Court's prior decisions applying these First Amendment standards to legislative attempts to restrict independent expenditures have consistently held that such restrictions were unconstitutional.

Moreover, application by this Court of the compelling state interest analysis in the context of campaign finance regulation has turned on the fundamental distinction between limitations on independent expenditures and limitations on contributions to a candidate. See *Buckley*, 424 U.S. at 23-38. Indeed, the Court expressly has stated that a restriction on independent expenditure requires a more

compelling justification than a restriction on campaign contributions. See *MCFL*, 107 S.Ct. at 629; *Buckley*, 424 U.S. at 20-22.

In upholding the contribution limits of the Federal Election Campaign Act in *Buckley*, this Court emphasized that restrictions on contributions serve the primary purpose of "limit[ing] the actuality and appearance of corruption" resulting from large direct contributions to candidates. *Id.* at 26. The limit on contributions "focuses *precisely* on the problem of large campaign contributions —the narrow aspect of political association where the actuality and potential for corruption have been identified —while leaving persons free to engage in independent political expression . . . ." *Id.* at 28 (emphasis added).

By contrast, the Court has been reluctant to uphold state limitations on independent expenditures, on the ground that such limitations are less precisely focused on the identified problem of actual and potential corruption. Thus, the Court has invalidated a ban on independent corporate expenditures for speech related to ballot referendum issues. *Bellotti*, 435 U.S. 765. Similarly, in *Buckley*, the Court found that the "government interest in preventing corruption and the appearance of corruption" was "inadequate to justify [FECA's] ceiling on independent expenditures" by individuals and groups. *Buckley*, 424 U.S. at 45.[10] The Court also rejected the notion that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy . . . imposed by [FECA's] expenditure ceiling." *Id.* at 48.

More recently, in *NCPAC*, 470 U.S. 480 (1985), the Court struck down provisions of the Presidential Election Campaign Fund Act ("Fund Act") which made

[10] This "most drastic" limitation restricted individuals and groups to an expenditure of $1000 per year to advocate the election or defeat of "a clearly identified candidate." *Id.* at 41.

it a criminal offense for any "political committee" [11] to make independent expenditures in excess of $1000 in support of any candidate who has accepted public funding. 470 U.S. at 491.[12] The Court held that, for reasons analogous to those stated in *Buckley*, the expenditure limitation was "constitutionally infirm" because there is "no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption." 470 U.S. at 497. Corruption and the appearance of corruption "are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Id.* at 496-497.

The Court in *NCPAC* emphasized that the "hallmark of corruption is the financial *quid pro quo*: dollars for political favors." 470 U.S. at 497. Because "the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate,"

> the absence of prearrangement and coordination undermines the value of the expenditure to the candi-

[11] The term "political committee" is broadly defined in the Act to include "any committee, association, or organization (whether or not incorporated) which . . . makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." *NCPAC*, 470 U.S. at 491-92 (quoting 26 U.S.C. § 9002(9)).

[12] The Court concluded that such independent expenditures constitute protected speech "at the core of the First Amendment" and that the Act infringed the right to engage in such speech. According to the Court, "allowing the presentation of views while forbidding the expenditure of more than $1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* at 493. The Court also specifically "reject[ed] the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection." *Id.* at 494.

> date, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 498. Thus, it is clear that the form of the restriction—*i.e.*, a limit on independent expenditures rather than on contributions—was central to the Court's analysis in *NCPAC*.

The Court in *NCPAC* also distinguished its decision in *FEC* v. *Nat'l Right to Work Comm.* (*"NRWC"*), 459 U.S. 197 (1982), which had upheld a FECA provision that permitted the use of corporate funds to solicit contributions to the corporation's PAC, but limited such solicitations to "stockholders or members of a corporation without capital stock." *NCPAC*, 470 U.S. at 495. This restriction had been upheld "in view of the well established constitutional validity of legislative regulation of corporate contributions for public office." *Id.* at 495. The Court also noted that *NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate [corporate] views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates." *Id.* at 495-496.

Most recently, in *MCFL*, a majority of the Court held that the FECA's prohibition on corporate independent expenditures could not constitutionally be applied to the expenditures of a not-for-profit, non-stock corporation. In applying the compelling state interest analysis, the Court began by emphasizing that, although MCFL had adopted a corporate form, it essentially was an advocacy group or special-interest group, "formed to disseminate political ideas, not to amass capital." *Id.* at 628. Thus, MCFL did not present the risks previously recognized in the context of business corporations: "[t]he resources [MCFL] has available are not a function of its success

in the economic marketplace, but its popularity in the political marketplace." *Id.* at 628.[13]

The Court rejected the argument that allowing such contributions by non-profit "interest group" corporations "would open the door to massive undisclosed political spending." *Id.* at 630. The "reporting obligations" under the Act would provide the "information necessary to monitor MCFL's independent spending activity and its receipt of contributions." *Id.* Thus, the state's interest in "disclosure" can be met "in a manner less restrictive" than a ban on MCFL's independent expenditures. In sum, the Court concluded that the "desire for a bright-line rule" (*i.e.*, a rule which strictly limited expenditures by all "corporations"), "hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *Id.* at 630.

C. The Ban On Independent Expenditures By Incorporated Membership Organizations Is Not A Narrowly Tailored Means To Advance A Compelling State Interest And, Accordingly, Is Unconstitutional

In this case, the Michigan State Chamber of Commerce and *amici curiae* share most of the relevant characteristics of the "advocacy group" or "interest group" corporation addressed in *MCFL*. Each engages primarily in political and public policy advocacy on behalf of its members and does not engage in business for a profit. See

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[13] The Court again distinguished *NRWC* as a case involving "contributions"—and thereby appropriately addressed by a "broad prophylactic rule"—rather than a case involving independent expenditures, which only may be limited by "more precis[e]" regulation. *MCFL*, 107 S.Ct. at 629 ("the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of independent spending"); *MCFL*, 107 S. Ct. at 629 ("We have consistently held that the restrictions on contributions require less compelling justification than restrictions on independent spending.").

Motion to Affirm, 7; *MCFL*, 107 S.Ct. at 631. Each is supported primarily by the dues of its members and has no shareholders or other persons who would have a claim on its "earnings." See Motion to Affirm, 4; *MCFL*, 107 S. Ct. at 631.[14]

However, the Chamber (and at least one *amici*—AIA) is factually distinguishable from MCFL on a single ground, which appellants claim to be determinative. In reiterating the "features" of a protected advocacy group essential to its holding in *MCFL*, this Court stated that "MCFL was not established by a business corporation . . . and it is its policy not to accept contributions from such entities." *MCFL*, 107 S. Ct. 631. The Court did not, however, hold that these facts were important to the constitutional analysis for their own sake, but rather because they demonstrated that MCFL was not "serving as [a] conduit[] for the type of direct spending that creates a threat to the political marketplace."

Appellants' primary argument is that, because many of the Chamber's members are business corporations, and the Chamber therefore does not follow the same policy as MCFL did, the statute as applied to the Chamber must be constitutional.[15] But, the absence, by itself, of one portion of one feature identified in the *MCFL* opinion cannot substitute for a careful analysis of whether the relationship between the interests asserted and the means employed by the State of Michigan to serve those

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[14] Section 501(c)(6) organizations may not be "organized for profit" and "no part of the net earnings" of such an organization may "inure[] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6).

[15] Appellant's argument appears to *assume* that the First Amendment does not preclude an absolute ban on corporate expenditures. However, this Court never has addressed the question "whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *NCPAC*, 470 U.S. at 496.

interests are sufficient to justify the significant infringement of appellee's First Amendment rights. Because it is clear that Michigan's attempt to ban independent expenditures in this case is flawed in precisely the same ways that the statute in *MCFL* was, the decision below should be affirmed.[16] In any case, appellants' argument fails to justify a statutory ban on independent expenditures by many incorporated associations, such as *amici* AMA and NAR, whose members are individuals not corporations.

Appellants point to several compelling state interests that they claim are served by the ban on appellee's independent expenditures. First, appellants argue that the state has a compelling interest in preventing corporate "corruption" of the political process by outlawing expenditures derived from "political 'war chests' which could be used to incur political debts from legislators." App. Br., at 28-29. Second, appellants suggest that such independent expenditures must be banned to ensure that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form" are not used to dominate or overwhelm competing voices in the marketplace of political speech. App. Br. 42. Finally, appellants argue that limitations on independent expenditures serve the "compelling" interest of protecting third parties who might pay money into a corporate treasury (*i.e.*, shareholders or customers) from having their "money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208. No interest identified by appellants is sufficient to support an absolute ban on independent expenditures by the

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[16] Like the State of Michigan, the Federal Election Commission has adopted the position that a single dollar of corporate money is sufficiently "corrupting" to preclude independent expenditures by an advocacy group or association that receives such funding. See Advisory Opinion 1987-7, Fed. Elec. Camp. Fin. (CCH), ¶ 5889 (April 6, 1987).

Chamber of Commerce or by other similar associations and advocacy groups.

1. Appellants first articulated interest—in preventing corporate "corruption" of the political process by outlawing expenditures "which could be used to incur political debts from legislators" (App. Br. 28-29)—does not support the ban on expenditures in this case. A generalized interest in preventing corporate "corruption" has been held by this Court not to be a compelling one in the context of independent expenditures. See *NCPAC*, 470 U.S. at 497. "Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL*, 107 S.Ct. at 630.

The Court recognized in *Buckley* that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. Thus, not only are independent expenditures of considerably less value (and thus, less likely to corrupt) than contributions, but the "absence of prearrangement and coordination" with the candidate "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*

The fact that some associations may be larger in size and (at least potentially) able to make larger expenditures than the organization at issue in MCFL does not automatically increase the state's interest.[17] As the Court noted in *NCPAC*, the fact that a particular type of or-

[17] It is simply not the case that associations whose members are business corporations are more likely to have greater resources for political expenditures than associations of individuals. It is the size of an association's membership (*and* the power of its ideas that attracts members to voluntary associations) which determines its political resources. Thus, the AMA and NAR, which each have many hundreds of thousands of *non-corporate* members, have far larger PAC resources than either the AIA or the Michigan State Chamber of Commerce, which have many corporate members.

ganization may be able to "spend larger amounts" than other organizations does not necessarily mean that the "potential for corruption is greater." 470 U.S. at 497-498. As long as "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more," the threat of corruption is nonexistent, regardless of the size or amount of the "uncoordinated expenditures" at issue. *Id.* at 498.[18]

Even if there were a real threat of corruption from the independent expenditures at issue here, the Michigan statute is far from a narrowly tailored response to the problem that the First Amendment demands. As the Court noted in analyzing a parallel federal statute in *MCFL*, a "broad prophylactic rule" was appropriate in regulating contributions only because of the "historical role of contributions in the corruption of the electoral process." 107 S. Ct. at 629. Here, there is no historical or contemporary evidence that independent expenditures are inherently corrupting, and therefore there is no justification for a broad prophylactic rule in this area. See *id.* (regardless of the abstract "desirability of a broad prophylactic rule," a regulation that infringes political speech "demands far more precision than § 441b provides").

The Michigan statute lacks constitutionally-required precision in responding to the state's interest in preventing corruption in several respects. For example, the statute is vague in the scope of its restrictions. It excludes an "expenditure for communication" from its reach only if the communication does not support or

[18] As in *NCPAC*, the argument that allowing independent expenditures by associations and other advocacy groups runs a substantial risk of corruption or the appearance of corruption is based on nothing more than the unsupported assertions of the State. Appellants brief fails to identify even a single instance of the use of an independent expenditure in a manner that gives rise to corruption or the threat of corruption.

oppose a candidate "by name or clear *inference*." MCL § 169.206(3)(c). A statute that can result in the imposition of significant civil or criminal penalties based on the "inference" that might be drawn by a public official from protected political speech hardly constitutes the kind of precise regulation that the First Amendment demands. In addition, the Michigan statute is overbroad. *Amici* AMA and NAR are associations of individual members and, under any reasonable analysis of the state's interest, they should be permitted to engage in independent expenditures under the Act. Yet, the Michigan statute would deny AMA and NAR the right to make independent expenditures merely because they are incorporated. The touchstone of narrowly tailored state regulation is substance over form, but the Michigan Act utterly fails that standard.

Most important, any threat of "corruption" that might result from independent expenditures can be more narrowly, and more appropriately, addressed by other regulatory requirements. For example, regulations could be adopted strictly proscribing any contact between the person making an "independent" expenditure and the candidate or his political committee, such as those imposed under FECA. See *supra*, 7. By imposing such regulatory restrictions, the FECA precludes the use of independent expenditures to evade the limits on contributions and the concomitant risk of corruption or the appearance of corruption.[19]

The risk of corruption also is more narrowly addressed by the reporting requirements already in place. The

[19] At least in part because of the rigorous federal regulations, independent expenditures for the 1987-1988 election cycle amounted to only about $21 million, about $1 million of which was expended by individuals. During the same period, federal PACs made a total of over $349,000,000 in expenditures, of which over $159 million constituted direct contributions to federal candidates. See FEC Press Release (April 9, 1989).

FEC, for example, requires reporting by Federal PACs of all disbursements in excess of $200 per calendar year "in connection with an independent expenditure." 11 C.F.R. § 104.3(b)(3)(vii). In addition, "[e]very person . . . who makes independent expenditures aggregating in excess of $250 during a calendar year" is required to file a detailed disclosure statement. 11 C.F.R. § 109.2. Contrary to the assertion of Appellants any "person" (including incorporated entities) who makes an independent expenditure under Michigan law is required to report to the Secretary of State. *Supra*, 6 n.5. Application of such disclosure requirements to the Chamber would foreclose the kind of corruption—*i.e.*, the political *quid pro quo*—that is the focus of the State's concern, without foreclosing protected political speech.

2. Appellants' interest in preventing *corporate* dollars from being used to make independent expenditures also is not a compelling state interest, at least when applied to an incorporated trade association. Although the Court has suggested that organizations "that amass great wealth in the economic marketplace" should be precluded from gaining "unfair advantage in the political marketplace" (*MCFL*, 107 S.Ct. at 631) that argument—even if valid—should not apply to incorporated trade associations, regardless of their membership.

a. Trade associations do not themselves compete in the economic marketplace. To the contrary, if an association is successful in obtaining substantial funding, its success is likely attributable to its ability to attract and keep large numbers of members rather than to its success in the economic market place. Sucessful fund-raising in the trade association context is more akin to success in the political marketplace because it depends on the voluntary decisions of each member and the attractiveness of the association's ideas and agenda. *Cf. Buckley*, 424 U.S. at 21; *MCFL*, 107 S.Ct. at 628 ("[r]elative availability of

funds is after all a rough barometer of public support").

Appellant's argument is based, at least in part, on the assumption that the "wealth" of the Michigan State Chamber of Commerce PAC reflects the "corporate" status of its members. In fact, the Chamber PAC's strength results primarily from the size of its membership—about 8,000 companies and individuals—and not from the form of organization or the wealth of some of these members. Associations with fewer members find it more difficult to raise funds to engage in political speech because of the comprehensive regulatory scheme under which they must operate. See *supra*, 8. The effect of these regulations is the same whether the associations' members are individuals, small companies, or major corporations.[20]

Appellants also argue that when an association has corporate members, it may serve as a conduit "for the type of direct spending that creates a threat to the political marketplace." Brief for Appellants, at 39-40 (quoting *MCFL*, *supra* at 631). The conduit argument, however, is based on the false premise that the association is a passive servant of its membership and that its members share an identity of interest. This is not realistic in an organization such as the Michigan Chamber of Commerce, which has 8,000 members engaged in diverse businesses. Moreover, trade associations often are deeply divided on issues because members of the same industry have different economic interests. While the conduit argument might possibly have some force for associations with few members in particularly unified industries, this hardly justifies a statutory prohibition that applies to all incorporated associations regardless of the number of members.[21]

[20] AIA-PAC is far smaller than AMPAC or RPAC because of its relatively small number of members, despite the fact that many of AIA-PAC's members are large, successful insurance corporations. Nevertheless, AMPAC and RPAC received six to eight times the funds received by AIA-PAC in 1987-1988 because they have a much larger pool of members to solicit. Moreover, AIA-PAC must obtain the written prior approval of each of its members before it may solicit the employees of that member. Because AIA-PAC may not solicit directly the PACS of its corporate members or their PACS (*supra*, 8), the absolute ban on political speech by the AIA itself gives rise to a significant burden. This pattern, in which the limitation on association PAC solicitation combines with the prohibition on associational expenditures to restrict speech severely, is a common result of existing campaign finance regulation in Michigan and in federal elections.

b. More fundamentally, the suggestion that the state has a compelling interest in banning corporate (or corporate-affiliated) speech because the "quantity" of such speech is likely to be excessive or "too effective" is flatly contrary to basic First Amendment principles. See, *e.g.*, *Buckley*, 424 U.S. at 16-18. At bottom, this amounts to nothing more than a direct restriction on speech *qua* speech, a rationale which never has been sanctioned by this Court. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

This Court already has stated that the "First Amendment's protection against governmental abridgement of free expression cannot be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 49; see *Eastern R.R. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). Thus, this Court in *Buckley* rejected the argument that limits

[21] Moreover, the risk that a trade association would serve as a "conduit" for corporate funding can be addressed readily by disclosure and other regulations that allow examination of (1) the source, volume and distribution of funding; (2) the "control" and management of association speech; and (3) the legitimacy of the association's independence from its members. As long as an association is not a "sham," the risks that it will serve as a conduit for corporate funding are misplaced.

on independent expenditures would be upheld based on the government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections . . . ." *Id.* at 48. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Id.* 48-49.[22] If the First Amendment's protection of the free marketplace of ideas has any meaning, it must prohibit the government from restricting the speech of certain speakers for no other reason than to enhance the voice of their competitors. Thus, even if the appellants correctly believe that limits on associational expenditures are a necessary means to their end of limiting "corporate" expenditures, their ultimate end—a ban on corporate expenditures—is not consistent with the First Amendment.

3. Appellant's final articulated "interest" is "to protect shareholders" who have paid money into a corporation from having that money used "to support political candidates to whom they may be opposed." Brief of Appellants, at 35. In essence, this argument suggests that the prohibition on "corporate" independent expenditures is necessary to prevent the officers and directors of a corporation from "improperly" using corporate assets to support associations or trade groups that, in turn, make independent expenditures relating to candidates that the shareholders do not support. This is, however, no basis for a flat ban on an incorporated trade association's protected speech.

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[22] The Court in *Buckley* rejected the analogy that the "volume" of some political speech—like the decibels emitted by a sound truck (*Kovacs* v. *Cooper*, 336 U.S. 77 (1949))—could be regulated as a legitimate time, place and manner restriction. *Buckley*, 424 U.S. at 18 n.17.

The incorporated associations to which the statute applies have no shareholders that require government protection. The association's members, corporate and otherwise, are fully capable of resigning if they disagree with the association's use of their funds. Association members have "no economic disincentive for disassociating with [an association] if they disagree with its political activity." *MCFL*, 107 S. Ct. at 631. Moreover, to the extent that shareholders disagree with their corporation's membership in a trade association, the longstanding common law and statutory rules of corporate governance provide them with ample authority to protect their own interests.

The traditional test of whether a business corporation is "properly" spending money has never depended on the consent of the individual shareholders. H. Henn & G. Alexander, Laws of Corporations, 550 (1983).[23] Where such spending decisions are *not* in the best interests of the corporation, the common law provides the shareholder with a remedy. It is a familiar principle that the officers and directors of a corporation have a duty of loyalty and duty of due care in their dealings with regard to the corporation, including a duty not to waste the assets of the corporation. Revised Model Business Corp. Act §§ 8.30-8.31, 8.40-8.42 (1985); Laws of Corporations, *supra*, at 611-663. If such "waste" occurs, the officers and directors are individually liable to

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[23] Under the common law, consent of the shareholders is not necessary when the corporation, through its directors or officers, decides to make an expenditure—even if, for example, that expenditure relates to the services of a law firm or lobbyist to work in favor of particular legislation. See, *e.g.*, ABA-ALI Model Bus. Corp. Act § 35 (all corporate powers vested in board of directors); Cal. Corp. Code § 300; Del. Gen. Corp. Law § 141(a). The officers and directors of the corporation historically have been permitted to make decisions on the best use of corporate assets—in accordance with the best interests of the corporation—even if the majority of the shareholders *personally* might disfavor the legislation that the corporation has decided to support.

the corporation (and its shareholders) for their misuse of corporate funds. Laws of Corporations, *supra* at 622-623.[24]

Finally, even if the state could deem it an injury to permit corporations to engage (through trade associations) in independent expenditures in which their shareholders individually and personally may disagree, such concerns—like concerns with "corruption"—readily may be responded to in a more narrowly tailored fashion. See *supra* 21-22. Indeed, such concerns may be directly and completely addressed through requiring corporations that contribute to trade associations engaged in independent expenditures to provide their shareholders (and the public) with full disclosure of such activities.

Such an approach would permit individual shareholders (and customers) to determine whether or not the expenditure was "appropriate," without curtailing the speech of the corporation and those stockholders and customers who support its position. If a shareholder, disagrees with a corporation's (or its association's) political position, he can act accordingly and sell his stock. Indeed, if the expenditure—whether made directly or through an association—constitutes "waste," a shareholder could bring suit. A customer who disagreed with corporate speech can take his business elsewhere. Such an approach would be more consistent with our constitutional commitment to a "marketplace of ideas" than the Michigan Act, which simply prohibits associational speech on the ground that some individuals indirectly affiliated with the association might dissent from the association's position.

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[24] See "The Business Judgment Rule and Corporate Directors' Liability for Mismanagement," 22 Baylor L. Rev. 157 (1970); *Roth* v. *Robertson*, 118 N.Y.S. 351 (Sup. Ct. 1909) (director liable for "waste and misapplication of corporate funds"); *Shlensky* v. *Wrigley*, 95 Ill.App.2d 173, 237 N.E.2d 776 (1968).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD H. AUSTIN, *et al.*,

Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,

Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* IN SUPPORT OF APPELLEE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

The American Civil Liberties Union submits this brief as *amicus curiae* in support of the judgment of the United States Court of Appeals for the Sixth Circuit, holding section 54(1) of the Michigan Campaign Finance Act unconstitutional as applied to the independent expenditures of a non-profit, membership corporation.

Letters from counsel for each of the parties, consenting to the filing of this *amicus* brief, have been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union, Inc. ("ACLU"), is a non-profit, membership corporation incorporated under the laws of the State of New York, with approximately 250,000 members throughout the United States. For nearly seventy years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving government regulation of election campaign speech. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of federal election laws. The ACLU has participated as *amicus curiae* in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981); *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Election Commission v. National*

Conservative Political Action Committee, 470 U.S. 840 (1985); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986); *Meyer v. Grant,* 108 S. Ct. 1886 (1988), and other cases raising issues similar to those presented here.

In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws.[1] Moreover, the ACLU has had to defend itself against the unconstitutional application of campaign finance laws to its non-partisan activities. *See American Civil Liberties Union v. Jennings,* 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union,* 422 U.S. 1030 (1975); *Buckley v. Valeo,* 519 F.2d 821, 871 (D.C. Cir. 1975) (*en banc*); *In Re ACLU,* Dkt. MUR 1802 (Federal Election Commission, 1984).

The ACLU, like the appellee here, and like thousands of other organizations that engage in political speech, has chosen to operate in corporate form. Laws that prohibit all corporations from engaging in otherwise constitutionally-protected conduct, for no other reason than that they hold corporate charters, threaten the ability of such groups and their members—including the ACLU and its members—to participate fully in the important national debates of our time.

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[1] *See, e.g., Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982); *United States v. National Committee For Impeachment,* 469 F.2d 1135 (2d Cir. 1972); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (*en banc*); *Federal Election Commission v. Survival Education Fund, Inc.,* No. 89-Civ-0347 (S.D.N.Y. filed January 17, 1989).

SUMMARY OF ARGUMENT

The Michigan law at issue in this case strikes at the heart of what the First Amendment protects: public discussion about how our Nation shall be governed. The fact that the association wishing to participate in that debate exists in corporate form does not place it outside the protection of the First Amendment, and thus the statute works a direct and substantial abridgment of core constitutional rights. Accordingly, it must be struck down unless the State can demonstrate a *compelling* need for its enforcement.

No such need has been or can be shown. Independent expenditures made for the purpose of purchasing public political speech simply do not amount to a corruption of the political process, and do not present the appearance of such corruption, as this Court has consistently held. Nor are the draconian prohibitions involved here necessary to prevent the flow of business money through non-profit corporations and into political speech, since bookkeeping and reporting requirements, deemed sufficient by Congress and this Court in similar contexts, can serve that purpose adequately.

The statute at issue also does not serve a compelling purpose with respect to the rights of dissenting members or shareholders of corporations, since the law's own provisions and history indicate that this was not its purpose; in any event, governmental suppression of the speech of private entities because of dissent internal to such entities would raise very serious constitutional difficulties of its own. Finally, there is nothing special about the nature of corporations or the source of their income that makes them more legitimately subject to political censorship than other organizations and associations.

The effort to regulate corporate political speech is fraught with unsupportable assumptions and impossible distinctions, and poses a continuing threat to the free speech rights of all. It

should be abandoned as inconsistent with the First Amendment.

ARGUMENT

I. SECTION 54(1) DIRECTLY RESTRICTS SPEECH AT THE CORE OF THE FIRST AMENDMENT'S PROTECTION.

Section 54 of the Michigan Campaign Finance Act, MCL § 169.254, J.S. App. 104a, makes it a felony, punishable by up to three years' imprisonment and a fine of up to $10,000, for any corporation (or any individual acting on its behalf) to make any expenditure—including an independent expenditure—"in assistance of, or in opposition to, the nomination or election of a candidate." J.S. App. 91a.[2]

It is beyond dispute that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). Thus, communications such as the one involved in this case—an independent expenditure[3] made to purchase a newspaper advertisement supporting the election of a candidate for public office—lie "at the core of the First Amendment." *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 840 (1985) ("*NCPAC* "); *Buckley v. Valeo,* 424 U.S. 1, 39 (1976). And it is by now well settled that expenditures made to finance such communications, which are a *sine qua non* of effective political speech "in today's mass society," *Buckley,* 424 U.S. at 19, also "are entitled to full First Amendment protections." *NCPAC,* 470 U.S. at 496; *see also Buckley,* 424 U.S. at 19-23.

This Court, therefore, has consistently struck down laws restricting the independent expenditure of money to engage in political speech. *See, e.g., Buckley,* 424 U.S. at 39-51; *NCPAC, supra; FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986) ("*MCFL*"); *Meyer v. Grant,* 108 S. Ct. 1886 (1988). Michigan law makes such activity a felony if the actor is a corporation or its agent. But, as this Court has held, the constitutional right of free speech inures to the benefit of corporations as well as individuals and unincorporated associations. *See First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530 (1980). Accordingly, the mere fact that appellee is incorporated cannot justify this restriction on its speech.

Appellants and *amicus* Common Cause recognize that Section 54(1) is a substantial limitation on protected speech, and that a demonstration of compelling governmental interests is therefore required if the statute is to be upheld. *See* Brief for Appellants at 23-34; Brief for Common Cause at 3. *Amicus* FEC, however, asserts that the statute "does not restrict the State Chamber's political speech." FEC brief at 8 (initial capitals omitted).

The gist of the FEC's argument is that the restrictions of Section 54(1) can simply be ignored because Michigan law permits a corporation to establish a "separate segregated fund" that can make certain political expenditures. *See* MCL §

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[2] There is no indication that this broad statutory prohibition is restricted to "express advocacy" as this Court has developed that concept in cases from *Buckley* through *Massachusetts Citizens for Life.* Although the proposed advertisement in this case would appear to be squarely within the concept of "express advocacy," the statute's facial overbreadth is susbstantial. *See Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987).

[3] By "independent expenditure," we mean an expenditure that is neither a contribution to, nor coordinated with, a candidate's campaign. *See* MCL § 169.209, J.S. App. 97a (defining "independent expenditure" in similar terms).

169.255, J.S. App. 106a-109a. The FEC made precisely the same argument in *Massachusetts Citizens for Life, see* 479 U.S. at 252, and the Court rejected it, recognizing that the establishment and operation of such a fund is an onerous task, *see id.* at 253-55 (plurality opinion); 266 (O'Connor, J., concurring), and that since "the avenue [for speech] it leaves open is more burdensome than the one it forecloses," *id.* at 255, that is "sufficient to characterize [the statutory scheme] as an infringement on First Amendment activities." *Id.*

Thus, the fact that the Michigan State Chamber of Commerce (the "State Chamber") already operates a separate segregated fund is of no constitutional significance. Indeed, the fact is that Massachusetts Citizens for Life, Inc., *also* had a separate segregated fund; that did not change this Court's conclusion that it was entitled to make political expenditures using corporate funds. *See MCFL,* 479 U.S. at 255 n.8. A person who has chosen to comply with an unconstitutional law does not thereby waive the right to challenge it. One might as well argue that because a taxpayer had paid a particular tax, thereby demonstrating that he could afford to do so, his protest against it should be dismissed.

If appellee has a constitutional right to engage in political speech directly, the fact that it can also do so indirectly, through its separate segregated fund, is simply irrelevant, for the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison v. PSC,* 447 U.S. at 541 n.10. *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 n.15 (1976) (the availability of alternative methods of communication does not justify governmental restraints on a speaker's preferred means). As a unanimous Court emphasized only last year,

"the First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant,* 108 S. Ct. 1886, 1893 (1988).

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *MCFL,* 479 U.S. at 256. Accordingly, the prohibition on corporate independent expenditures in the Michigan Campaign Finance Act, like the parallel prohibition of the Federal Election Campaign Act involved in *MCFL,* must be tested by that strict standard.

II. SECTION 54(1) SERVES NO COMPELLING GOVERNMENTAL INTEREST.

Appellants assert that the political censorship at issue here is justified by the government's interests in eliminating political corruption or the appearance thereof, and in protecting individuals against the use of their money to support causes they may oppose. *Amici* FEC and Common Cause additionally argue that Section 54(1) serves a compelling interest in protecting the integrity of the political system against the "unfair deployment of wealth." Common Cause brief at 5; *see* FEC Brief at 11-12. None of these interests are sufficiently compelling, in the context of this case, to survive the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley,* 424 U.S. at 44-45.

A. Eliminating Corruption or the Appearance of Corruption.

This Court "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* [*v. Berkeley,* 454 U.S. 290 (1981)] that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far

identified for restricting campaign finances." *NCPAC,* 470 U.S. at 496-97. But the phrase "corruption or the appearance of corruption" is not a magic spell the mere incantation of which suffices to trump free speech rights. Rather, the burden rests squarely on the government to show that its asserted interests actually justify the censorship it wishes to impose. *See Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986). Nothing even remotely approaching such a showing has been made here.

1. Independent Expenditures by Non-Profit Corporations Do Not Pose a Threat of Corruption.

"Corruption," the Court has explained, "is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC,* 470 U.S. at 497.

Thus, as the Court has repeatedly explained in earlier cases, there is simply no actual or apparent "corruption" involved in making a public statement—through the purchase of newspaper space or media time—of support for or opposition to a candidate in an election campaign. Here, as in *NCPAC,* "the conduct proscribed is not contributions to the candidate, but independent expenditures," *id.,* a distinction that makes a "fundamental constitutional difference," *id.,* because they involve no *quid pro quo,* and, indeed, may be quite unappreciated by the candidate. *See id.; see also Buckley,* 424 U.S. at 47. Accordingly, the Court held in *Buckley* and reaffirmed in *NCPAC* and *MCFL,* such independent expenditures cannot be banned based on an unsupported cry of "corruption."

There is nothing in the record of this case that should cause the Court to alter its conclusion.[4]

Of course, the State Chamber is a corporation, but "associations do not suddenly present the specter of corruption merely by assuming the corporate form." *MCFL,* 479 U.S. at 263. In fact, both Massachusetts Citizens for Life, Inc., and the National Conservative Political Action Committee, Inc., were corporations. *See MCFL,* 479 U.S. at 241; *NCPAC,* 470 U.S. at 496. Like them, appellee is a non-profit, membership corporation, whose ordinary activities include promoting its members' interests through a variety of political activities. *See* J.S. App. 41a-42a.[5] There is simply no greater reason to presume that appellee's independent public expressions of support for a candidate are "corrupt" than there is to conclude that independent speech by an individual is corrupt, a presumption rejected in *Buckley;* or that independent speech by a large political action committee is corrupt, a presumption rejected in *NCPAC;* or that independent speech by a non-

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[4] Common Cause states that this interest "has never been more compelling," noting the "continuing series of scandals in the federal government [involving] the misuse of corporate money to influence government decisions, and the deleterious effects of such corruption on public confidence in our governing institutions." Common Cause Brief at 6, citing the influence-peddling now being uncovered at HUD, the "Ill Wind" investigation into procurement fraud at the Pentagon, and direct corporate gifts to Members of Congress in return for direct assistance. *Id.* at 6 n.14. The ACLU does not condone such misconduct any more than Common Cause does. We fail, however, to see what those examples—all of which involve the direct and surreptitious exchange of money for favors—have to do with the constitutionality of Section 54(1), which prohibits the public expression of political views.

[5] The fact that the Chamber of Commerce also engages in non-political activities hardly makes its political activities suspect. *See infra* note 14.

profit membership corporation, much like appellee except in size, is corrupt, a presumption rejected in *MCFL*. [6]

To be sure, the State Chamber's treasury may be larger than that of Massachusetts Citizens for Life, but NCPAC's pocket was apparently even deeper. *See* Brief for Appellant Common Cause at 33 n.53, *Common Cause v. Schmitt*, No. 88-847 (O.T. 1980) (reporting that NCPAC collected more than $7.6 million in 1979-1980 for use in the 1980 campaigns). The size of these figures, however, is irrelevant. Wealth is not synonymous with corruption. Even a small bribe is corrupt; even a large independent expenditure is not.[7]

In short, appellants assert an interest in preventing corruption or its appearance only because that is the judicially-approved route to upholding statutes that restrict political funding. But the facts of this case do not entitle appellants to proceed down that route.

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[6] *Buckley* and *NCPAC* make it clear that even large independent expenditures do not raise the specter of corruption, and cannot be prohibited on that ground. Yet the Michigan law challenged here bans independent expenditures of even small sums of money.

[7] Indeed, the size of an independent expenditure is not even a particularly good proxy for the size of a political favor. A single personal appearance by a political or entertainment celebrity may capture more votes for a candidate than a million dollars' worth of television commercials, and leave the candidate feeling more grateful for the favor. If the government has a compelling interest in eliminating grateful feelings on the part of politicians, then a ban on political endorsements by popular public figures will be the next logical step in election campaign "reform."

2. A Complete Ban on Independent Spending by Non-Profit Corporations that Receive Corporate Contributions is Not Necessary to Prevent Spending by Business Corporations.

Appellants and their *amici* also argue that, because the State Chamber has members who are business corporations, it must be prohibited from making independent expenditures in order to prevent it from acting as a "conduit" for money from such entities. *See* Brief for Appellants at 39-40, 46; FEC brief at 15; Common Cause brief at 20-24. Even assuming that such activity constitutes "corruption" and can constitutionally be prohibited,[8] it is simply not necessary to ban independent expenditures by groups such as the State Chamber in order to achieve that goal. Non-profit corporations can be required to fund their independent expenditures out of income from other sources, and to keep such records or file such reports as the government requires to demonstrate compliance with such limitations. *See MCFL*, 479 U.S. at 262 (reporting requirements of federal law "provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions").[9]

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[8] *But see infra* Part II-C-1.

[9] The Court of Appeals in this case stated that the reporting requirements of Section 51 of the Michigan law would serve this purpose. *See* J.S. App. 25a-26a. The State responds that Section 51 does not apply to corporations. Brief for Appellants at 24. Assuming the State to be correct, the constitutional solution is for Michigan to enact an appropriate reporting requirement. A State cannot impose a direct, content-based restriction on core First Amendment rights when a less restrictive alternative is available, simply because it doesn't feel like using the alternative. *See Boos v. Barry*, 108 S. Ct. 1157, 1165-68 (1988) (District of Columbia law banning demonstrations near embassies struck down in light of more narrowly drawn federal statute that adequately

Common Cause argues that because "[m]oney is fungible," such segregation of funds is meaningless. Common Cause brief at 21. However, neither Congress nor this Court shares that view, as federal legislation and judicial decisions demonstrate.

In the Internal Revenue Code, Congress has provided that non-profit, tax-exempt organizations qualified under 26 U.S.C. § 501(c)(3) (contributions to which are tax-deductible to the donor) may not engage in a substantial amount of lobbying activity, while organizations qualified under § 501(c)(4) (contributions to which are not deductible) may lobby freely. The congressional purpose is to avoid subsidizing lobbying with tax-deductible funds. *See Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 544 (1983). A great many non-profit organizations (including the ACLU) consist of affiliated (c)(3) and (c)(4) corporations. All that is required is "that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying." *Id.,* 461 U.S. at 544-45 n.6. But the (c)(3) organizations can exercise "control . . . over the lobbying of their § 501(c)(4) affiliates," and the (c)(4) organizations can engage in "lobbying explicitly on behalf of their § 501(c)(3) affiliates." *Id.* at 553 (Blackmun, J., concurring). Under Common Cause's reasoning, this careful statutory scheme is "economic nonsense," Common Cause brief at 20, because "money from one source that is used for one activity frees up money from other sources to be used for

served same interests, even though legislation would be necessary to make federal statute applicable in the District of Columbia).

other activities." *Id.* at 21. Obviously, Congress does not agree with that assessment.[10]

Nor does this Court share the view that Common Cause urges here. In a series of constitutional cases arising under the Establishment Clause of the First Amendment, the rule has been established that government financial assistance to private, religious schools for discrete, secular activities will not be considered as a subsidy for the schools' religious activities merely because "money from [the government] source that is used for one activity frees up money from other sources to be used for [religious] activities." *See Everson v. Board of Education,* 330 U.S. 1 (1947); *Board of Education v. Allen,* 392 U.S. 236 (1968); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Roemer v. Board of Public Works,* 426 U.S. 736 (1976).[11] Accordingly, there is no reason to assume that any concern about the use of non-profit corporations as "conduits" for the funds of business corporations cannot be adequately addressed through bookkeeping and reporting requirements.

Moreover, to the extent that such requirements are not a foolproof guarantee against some small leakage of business funds into non-profit expenditures, the Court has already explained that direct and substantial restraints on political speech "cannot be sustained simply by invoking the interest in

[10] The ACLU, as *amicus curiae* in *Taxation With Representation,* argued that the statutory restrictions on lobbying by § 501(c)(3) organizations were unconstitutional. The Court concluded, however, that the requirements of separate incorporation and bookkeeping were "not unduly burdensome." 461 U.S. at 544-45 n.6. By contrast, the Court emphasized the extensiveness and complexity of the "separate segregated fund" restrictions involved in *MCFL,* and concluded that they *were* unduly burdensome.

[11] Whether the line has been correctly drawn under the Establishment Clause is a separate issue. But as long as it exists, the rule of segregated funds can and should be applied in this context as well.

maximizing the effectiveness" of other regulations. *Buckley,* 424 U.S. at 44. This is so because the First Amendment is not a disfavored "loophole" in an edifice of governmental regulation of speech; under our Constitution, it is the other way around: "debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964). It is not government censorship that must be augmented for optimal effectiveness, but "First Amendment freedoms [that] need breathing space to survive." *NAACP v. Button,* 371 U.S. 415, 433 (1963).

3. A Complete Ban on Independent Spending by Non-Profit Corporations Gives Government Too Potent a Weapon to Harass Public Issue Advocacy.

Appellants argue that the criteria identified by this Court in *MCFL* for constitutionally exempting certain non-profit corporations from statutory prohibitions on political campaign expenditures are not met in this case. *Amici* FEC and Common Cause, however, would essentially have this Court limit that decision to its special facts, thereby denying First Amendment protection to non-profit corporations that accept any contributions from business corporations.

These suggestions must be analyzed in the context of the total statutory ban on any corporate political expenditures and the frequently malleable nature of the "express advocacy" concept that defines such expenditures. In *Buckley,* this Court recognized the danger that a broad definition of "expenditure" could ensnare a wide range of vital discussion of public issues in the net of campaign finance restrictions. Accordingly, the Court ruled that regulation of independent expenditures could only attach to "communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43.

But as important as this limitation has been, it is subject to the vagaries of context and interpretation.[12]

The Federal Election Commission has persistently pressed for a broad and expansive interpretation of the "express advocacy" concept, to the point where one court chastized it for pursuing a "totally meritless" complaint over a $135 expenditure, *see Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*), with a concurring opinion charging that the Commission had "failed abysmally" to show sensitivity to First Amendment rights. *Id.* at 55 (Kaufman, C.J.).

The combination of an aggressive agency view of what constitutes "express advocacy" and broad statutory prohibitions on corporate expenditures that could be so characterized puts at considerable risk the political speech of many issue-oriented organizations that take corporate form. If their public advocacy can in any way be construed by the Commission as "express advocacy"—for example, if it criticizes an incumbent President during an election year—then they risk a charge of having made an illegal expenditure under 2 U.S.C. § 441b. Indeed, in recent years such charges have been filed with the Commission against such groups as Planned Parenthood, the National Organization for Women, the Wilderness Society, the Sierra Club and the Committee for Sane Nuclear Policy. The Commission even entertained charges against the ACLU, and it took a ten-page General Counsel's Report for the Commis-

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[12] *Compare MCFL,* 479 U.S. at 248-50 (finding express advocacy) *and Federal Election Commission v. Furgatch,* 807 F.2d 857 (9th Cir. 1987) (same) *with Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (*en banc*) (finding no express advocacy) *and Federal Election Commission v. National Organization for Women,* C.A. No. 87-2269 (D.D.C. 1989) (same).

sion to conclude that there was "no reason to believe" that ACLU fund-raising mailings, attacking President Reagan's record on civil liberties during a Presidential election year, constituted an illegal corporate expenditure.

For these reasons, any narrowing of *MCFL* will place issue organizations in even greater danger of being the target of enforcement proceedings on claims, however marginal, that their political speech constitutes "express advocacy." Similarly, a rule that automatically prevents non-profit corporations from qualifying for the *MCFL* exemption if they receive any contributions from business corporations would disable many advocacy organizations from invoking the *MCFL* protections, since many do receive a small portion of their contributions from business organizations. *See FEC v. N.O.W., supra.*

Thus, non-partisan issue-oriented organizations require careful protection against government harrasment of their speech: both a strict definition of the "express advocacy" concept, *and* a broad First Amendment-based rule that non-profit organizations cannot be punished for such advocacy under statutory prohibitions of corporate expenditures that were intended to apply to profit-making business corporations, not issue-oriented organizations that take the corporate form.

B. Protecting the Rights of Dissenting Members.

The second interest advanced by the State as a justification for Section 54(1) is the interest in "protect[ing] shareholders who have paid money into a corporation 'for purposes other than the support of candidates from having that money used to support candidates to whom they may be opposed.'" Brief for Appellants at 35, *quoting Federal Election Commission v. National Right to Work Committee,* 459 U.S. 197, 208 (1982). This purported interest is not truly present in this case, nor would it be compelling if it were.

1. This Court has already disapproved this alleged state interest as one that can justify governmental prohibition of corporate speech in circumstances such as those presented here. In *Bellotti, supra,* Massachusetts law prohibited business corporations from spending money to urge the passage or defeat of ballot questions. In defense of the law, the State asserted the same interest in "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree" that appellants proffer here. *See* 435 U.S. at 792-93.

Assuming, *arguendo,* that such an interest could be compelling, the Court rejected the State's submission, noting that the State's asserted purpose was "belied . . . by the provisions of the statute," *id.* at 793. which were both underinclusive and overinclusive: underinclusive in that thay permitted corporations to engage in other political advocacy (such as lobbying) without regard to the displeasure of dissenting shareholders, and permitted unincorporated organizations to urge the passage or defeat of ballot questions without regard to the views of dissenting members; overinclusive in that they prohibited a corporation from engaging in such speech even if the shareholders had unanimously authorized it. *Id.* at 793-95.

The circumstances here are preciseiy the same. The State's purported purpose is belied by its own law, which permits corporations to engage in other forms of political speech, including lobbying on controversial proposed legislation and public advocacy for or against ballot questions, "though the displeasure of disapproving shareholders is unlikely to be any less." *Bellotti,* 435 U.S. at 793. Similarly, the restriction does not apply to unincorporated "entities or organized groups in which numbers of persons may hold an interest or membership," even though "[m]inorities in such groups or entities may have interests with respect to institutional

speech quite comparable to those of minority shareholders in a corporation." *Id.* Finally, Michigan law is identically overinclusive, prohibiting the specified communications "even if its shareholders [or members] unanimously authorized the . . . expenditure." *Id.* at 794. Moreover, appellants have produced no evidence indicating that the protection of shareholders' rights was, in fact, a purpose of the Michigan Campaign Finance Act. *See Mississippi University for Women v. Hogan,* 458 U.S. 718, 730 (1982) (State's asserted justification for constitutionally-suspect legislation rejected in part because it "failed to establish that the alleged objective is the actual purpose" of the law).

Thus, whatever force this asserted interest might have in a proper case, it is clear that it is not in fact an interest that Michigan views as compelling in the context of election finance regulation.

2. Nor is there any reason to believe that the members of the State Chamber joined that organization or pay their dues in ignorance of, or in disagreement with, its activities or its political orientation as an advocate for the interests of the business community.[13] While there may be other benefits of

[13] Both Common Cause and the FEC insist that the State Chamber is wholly unlike MCFL because MCFL is an ideological organization, while "the Chamber was established by business corporations to promote their economic interests." Common Cause brief at 12; *see also* FEC brief at 16. But a great deal of political debate involves the economic interests of various groups. When the Grange lobbies for crop supports, the AFL-CIO campaigns for an increase in the minimum wage, the AARP works for catastrophic health insurance for the elderly, the VFW pushes for an extension of the GI Bill, or the CCNV demonstrates for low-income housing, they are engaging in political activity to advance the economic, as well as the ideological, interests of their members. This does not render their advocacy any less than fully protected by the First Amendment. *See, e.g., Meyer v. Grant, supra,* 108 S. Ct. at 1894

membership, such as the ability to purchase group insurance or to receive Chamber publications at discount rates, *see* Common Cause brief at 13-14; FEC brief at 13-14,[14] this is hardly a situation where Michigan businesswomen and men have little choice but to belong to the Chamber of Commerce regardless of their sympathy with its politics.[15] Thus, like the

(political activity by Coloradans for Free Enterprise, Inc., to repeal state regulation of the trucking industry is at the "zenith" of First Amendment freedoms); *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 139 (1961) ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them"); *Thomas v. Collins,* 323 U.S. 516, 540 (1945) (the First Amendment protects "he who seeks to rally support for any social, business, religious or political cause"). This is a free speech case, not an economic substantive due process case. Business interests are not seeking to avoid government regulation of their business; they are resisting government censorship of their speech.

[14] There are probably few major membership organizations that engage in political advocacy and do not also provide some valuable benefits to members, including the ACLU. For example, the Sierra Club organizes wilderness excursions for its members, offers a variety of camping and outdoor equipment and publications for sale at a discount to members, and publishes a monthly membership magazine. The American Automobile Association provides its members with emergency road service, maps and vacation planning services, and group insurance, and also engages in political speech on behalf of the interests of motorists, as the AAA views those interests.

[15] Appellee has approximately 8,000 members, of which more than 6,000 are corporations. J.S. App. 41a. There are over 3,277,000 active corporations in the United States. *See* U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 516 (Table 846) (1985 data). If only 2% of them operate in Michigan (presumably a very low estimate), then fewer than 10% of Michigan businesses are members of the State Chamber of Commerce.

resources available to MCFL, the resources available to the State Chamber "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *MCFL*, 479 U.S. at 259.

In reality, "[i]t is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy . . . of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests." *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 123 (1948). Members who disagree frequently enough, or strongly enough, with the views expressed by an organization to which they voluntarily belong, or by a corporation in which they own stock, can always quit or sell their stock, and frequently do.[16]

3. Even if a State legislated unambiguously in furtherance of this interest, however, and even if there were a significant number of dissenting members or shareholders, it would seriously threaten basic constitutional values to allow the government to override a private, voluntary organization's right of free expression. It is, for example, no secret that with respect to virtually every issue on which the ACLU expresses a public position, some of its members disagree, often strongly.[17] By

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16 Of course, different principles apply when membership in, or payments to, an organization are legally or practically compulsory. *Compare, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *with Bellotti*, 435 U.S. at 794 n.34 (noting this "critical distinction").

17 "Most of our decisions are made by a board of directors by a vote of 42 to 36, with 12 abstentions, and three motions to reconsider. I would be surprised if there was a single member of the ACLU that didn't disagree with 10 or 12 things that we do—and that includes me." Ira Glasser (Executive Director, ACLU), *Presidential Politics and the ACLU*, speech at the National Press Club, Washington, D.C. (Oct. 6, 1988).

the same token, some members of Common Cause no doubt disagree with some of the views that it has expended their dues to express.[18] Some shareholders of the Mobil Corporation surely disagree with the views it has expressed in its series of newspaper commentaries, and some shareholders of Texaco Inc. probably can't stomach the Metropolitan Opera. Endorsements of candidates occupy no special position with respect to engendering shareholder or membership dissent. If the government could, by asserting a "compelling interest in protecting minority rights," silence the voices of private, voluntary organizations whenever a minority of the organization's members disagreed with the majority's decision, the First Amendment would be seriously diluted.

C. Avoiding the "Unfair Deployment of Wealth" and Protecting the "Integrity of the Political Process."

1. Appellants and their *amici* play their basic theme in close harmony: that it is "unfair," Brief for Appellants at 41; Common Cause brief at 2, and "corrosive," FEC brief at 12, for "concentrated corporate wealth," *id.*, "amassed through the corporate form," Common Cause brief at 2, in "the economic marketplace," Brief for Appellants at 41, to be allowed into election campaigns.

Of course these arguments, however valid they may be with respect to business corporations, have nothing to do with the activities of non-profit membership corporations such as the State Chamber. And when they are subjected to the "close

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18 Many people are members of both the ACLU and Common Cause, and cannot possibly agree with their divergent positions on the controversial political issue of election campaign finance regulation.

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examination of [their] underlying rationale" that the First Amendment requires, *MCFL,* 479 U.S. at 257, it is not at all clear why independent expenditures even by business corporations are constitutionally different from expenditures by so-called "ideological" corporations, unincorporated associations and individuals, all of which have been protected.

The argument appears to rest on two interrelated grounds: that corporate funds are different because they are "'amassed by the special advantages which go with the corporate form of organization,'" Brief for Appellants at 42, *quoting MCFL,* 479 U.S. at 257, and that corporate funds are different because corporations earn their money through the sale of goods and services, rather than receiving voluntary political contributions, *see* FEC brief at 13; Common Cause brief at 6. Upon examination, however, neither ground persuasively distinguishes the funds earned by a corporation from those earned by others.

With respect to the first ground, it is exceedingly difficult to identify the special advantages of corporate form that are thought to be relevant, or to learn why or how they are thought to be relevant, to the asserted distinction. In *MCFL,* the Court noted this theory, 479 U.S. at 257, without specifying the relevant advantages or explaining their significance, but citing to *National Right to Work Committee, supra,* 459 U.S. at 207. That case, in turn, noted the concern about the "special advantages which go with the corporate form of organization," *id., citing United States v. Automobile Workers,* 352 U.S. 567, 579 (1957), but again did not specify what these advantages were or indicate why money earned by corporations was different from money earned by partnerships, proprietorships or individuals. The *NRWC* Court did, however, identify the underlying governmental interest in regulating the political use of corporate money: it was the interest in preventing

"corruption threatened by large financial *contributions.*" *Id.* at 208 (emphasis added). The *Automobile Workers* case contains no discussion of any special advantages of corporate form at the cited page; indeed the case, and the discussion at that page, involved congressional concern with large contributions made by powerful labor unions. The trail ends there.

It is, of course, true that corporations have some advantages compared to other forms of organization, for example, they are subject to "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets." *Bellotti,* 435 U.S. at 809 (White, J., dissenting). But the majority in *Bellotti* viewed these differences as irrelevant to a corporation's right to engage in free speech with respect to ballot issues, and no reason has been suggested here why they are any more relevant with respect to speech about candidates.[19]

The second prong of appellants' argument is that it is "unfair" for "resources amassed in the economic marketplace" to be used "in the political marketplace" because these resources reflect "the economically motivated decisions of investors and customers" rather than "popular support for the corporation's political ideas." *MCFL* at 258. But except for funds raised by explicitly political organizations such as MCFL and NCPAC, virtually *all* money "amassed" in the

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[19] It is worth noting that other forms of organization have special advantages of their own: tax exemption, for example. And some partnerships or unincorporated associations have existed far longer than most corporations and have accumulated far greater assets than most corporations—Lloyd's of London, for example, has been in unincorporated existence since the early 18th Century, *see* Webster's Deluxe Unabridged Dictionary 1059 (2d ed., 1979), and some law partnerships have continued for several generations. Likewise, the National Collegiate Athletic Association, a large and well-financed organization, is an unincorporated association. *See NCAA v. Tarkanian,* 109 S. Ct. 454, 455 (1988).

United States is earned in the "economic marketplace" and reflects something other than popular support for the "amasser's" political views. An individual who is wealthy because he made a better mousetrap cannot constitutionally be prohibited from spending it on political speech, even if he is a Socialist and most rodent-hunters are Republicans. Why, then, should the owners of Better Mousetrap, Inc., be prohibited from doing so?

Indeed, the Court has acknowledged that there is nothing special about corporations in this regard, except that they are "the most prominent example" of wealthy entities. *MCFL*, 479 U.S. at 258 n.11. In other words, legislatures have chosen to restrict the political speech of corporations "because that's where the money is," or so they think.[20] But that is surely not the kind of narrow tailoring required of laws that directly restrict core political speech, for "the desire for a bright-line rule . . . hardly constitutes the *compelling* state

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20 In actuality, singling out corporations for regulation on this basis is not even particularly accurate. Some corporations have lots of money, but most have very little. *See* U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989 at 516 (Table 847) (over 700,000 corporations with gross receipts of less than $25,000) (1985 data). At the same time, some unincorporated associations are quite wealthy, *see, e.g.,* Brief for Appellant Common Cause at 33 n.53, *Common Cause v. Schmitt,* No. 88-847 (O.T. 1980) (reporting that NCPAC collected more than $7.6 million in 1979-1980 for use in the 1980 campaigns), as are some partnerships, some sole proprietorships, and some individuals, *see* STATISTICAL ABSTRACT OF THE UNITED STATES: 1989 at 516 (Table 847) (nearly 480,000 partnerships and 1,200,000 non-farm proprietorships with receipts greater than $100,000 in 1985); *see also The Am Law 100,* The American Lawyer, July/August 1989, special insert at 10 (reporting 100 law firms—most of which are unincorporated— with gross revenues of more than $52 million per year; the first-ranked firm had over $440 million in revenues in 1988).

interest necessary to justify any infringement on First Amendment freedom." *Id.* at 263 (emphasis in original). Nor, under *Buckley* and *NCPAC,* can there be a compelling governmental interest in the prohibition of independent expenditures by any person whose speech is protected by the First Amendment.

The Court has already held that affluent candidates, political action committees, and individuals cannot be precluded from using their wealth to attempt to influence the outcome of elections through public speech, because there is simply "nothing invidious, improper, or unhealthy in permitting such funds to be spent" in political debate. *Buckley,* 424 U.S. at 56. To the contrary, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. And as shown above, there is nothing about the sources of corporate money that makes its expenditure any less "healthy."

2. Even on its own terms, the prohibition of corporate expenditures is unworkable and senseless. The clearest example of why this is so is the universally-recognized necessity of exempting the press from such restrictions. For example, Section 6(3)(d) of the Michigan Campaign Finance Act exempts from the prohibition against corporate expenditures any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or in opposition to a candidate . . . ." MCL 169.206(3)(d), J.S. App. 92a-93a.

Newspapers, magazines and other media are generally owned by corporations, yet the First Amendment plainly will not tolerate a law prohibiting the expenditure of corporate funds by the Washington Post Company or the New York Times Company to endorse or oppose a candidate for public office. As the Court observed in *Mills v. Alabama,* 384 U.S.

214, 219 (1966), "[i]t is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." But if it is impermissible to prohibit Booth Newspapers, Inc. (the corporate publisher of the Grand Rapids Press) from spending its money to publish an editorial endorsing Dan Quayle on page 16, how can it properly be made a crime for the Michigan State Chamber of Commerce—or the Grand Rapids Furniture Company—to spend its money to buy space on page 17 endorsing Jesse Jackson?

The answer cannot be that one company is in the business of communicating and the other is not. Nearly all corporations communicate with the public. The Mobil Corporation, for example, has been running a series of paid editorial columns in newspapers for years. Nor are the media always owned by corporations whose major business is communicative: NBC, for example, is owned by the General Electric Co. And is a newspaper that operates at a substantial deficit, subsidized by a sister corporation that manufactures widgets, to be prohibited from publishing campaign editorials because the "real" expenditure is by the widget company? For that matter, even a profitable newspaper derives much of its income from the sale of advertising in the "economic marketplace," not from contributions from ideological supporters.

It was in part, perhaps, unanswerable questions like these that led a majority of the Court to conclude, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Id.* at 784 (dissenting opinion of Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); 773 (White, J., concurring in judgment) ("the First Amendment gives no more protection to the press . . . than it does to others exercising their freedom of speech").

In the District Court, appellee challenged the Michigan statute's exemption for media corporations as a denial of equal protection. That court, properly doubting that it could distinguish between media corporations and others, interpreted Section 6(3)(d) to make "no distinction between media and non-media corporations," and ruled that "Any corporation . . . may avail itself of the exemption." J.S. App. 73a. Under that interpretation, the State Chamber was apparently free, under the Michigan statute, to spend corporate funds to have ten thousand copies of its proposed advertisement printed as a handbill and distributed around town—a classic exercise of freedom of the press, *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("[t]he liberty of the press . . . necessarily embraces pamphlets and leaflets").

What possible legitimate state interest can it serve to permit that activity but prohibit the same entity from paying to have the same message published as an advertisement in the newspaper? Or, in an election in which a major issue dividing the candidates is free trade *vs.* protectionist tarriffs, what sense can it make to permit a corporation to publish an advertisement explaining why it is important to encourage free trade, but send its CEO to jail if the advertisement also identifies which candidate favors free trade or which favors high tarriffs? After all, the "[a]dvocacy of the election or defeat of candidates for [public] office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation," *Buckley*, 424 U.S. at 48—in both of which activities corporations have a constitutionally-protected right to engage.

Likewise, a regulatory scheme permitting corporations to speak freely on the "issues" but criminalizing any speech endorsing or opposing candidates draws such an indiscernable line that it must inevitably result either in self-censorship by

corporations anxious to stay out of jail, or the prosecution of companies engaged in protected speech, or both.

Even appellees' bright-line rule against independent expenditures by non-profit corporations that receive funds from business firms cannot resolve these difficulties, which illuminate the profound inadequacy of the government's regulatory approach to political speech. The only approach that avoids the sorts of arbitrary and discriminatory line-drawing noted above is to draw the bright line in the other direction: declaring that freedom of speech extends to corporations in this area as in others.

3. Moreover, there are positive features of corporate independent expenditures that, like the one proposed here, take the form of direct, open and public expression of political opinion and preference. Appellants and their *amici* dwell on the various ways in which corporations are allowed to use their funds for political activity: subsidizing the operation of separate segregated funds, lobbying, debating public issues, and the like, *see* Brief for Appellants at 49-56; Common Cause brief at 9-10, and conclude that corporations already have "enough" political speech alloted them and do not need the additional right to make independent political expenditures.

We draw a different conclusion: since there is already such significant corporate-generated expressive activity, what is the incremental harm in interpreting the First Amendment to permit independent political expenditures as well? Indeed, a paid editorial advertisement in a local newspaper, openly sponsored by particular corporation, is not only political speech of the purest kind, but, unlike some of the less visible sorts of corporate expenditures that are already allowed, it can be assessed by the public at face value. As the Court recently and unanimously observed: "the people in our democracy are entrusted with the responsibility for judging and evaluating the

relative merits of conflicting arguments. . . . The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech." *Meyer v. Grant,* 108 S. Ct. at 1894 n.7 (internal quotations and citations omitted).

4. Finally and even more basically, the attempt to keep money out of politics is both futile and dangerous. Common Cause correctly observes that "[m]oney is fungible." Common Cause brief at 21. But that is only half the story. Money is also the universal medium of exchange, and in a society in which communication and advocacy can be carried out in an infinitude of ways, it is, ultimately, simply not possible to prevent those who have money and care about politics from using their resources in the political world. If you are rich enough, you can buy (or establish) a newspaper.

This is not to say that some uses of money cannot be effectively prevented—bribery, for example, or other direct *quid pro quo* arrangements. But the attempt to sweep money utterly out of politics will not only fail, but will result in ever-greater restrictions on First Amendment freedoms while pushing money into new and perhaps even less desirable channels.

• • •

This Court has never upheld a direct restriction on the independent expenditure of funds used to create political speech. It has emphasized, rather, that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Meyer v. Grant,* 108 S. Ct. at 1895, *quoting Buckley v. Valeo,* 424 U.S. at 50. Here, Michigan has made such conduct a criminal offense for corporations and their agents. "The burden that [it] must overcome to justify this criminal law is well-

nigh insurmountable." *Id.* at 1894. It has not been surmounted here.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 88-1569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR AMICI CURIAE NATIONAL ORGANIZATION FOR WOMEN GREENPEACE ACTION NATIONAL ABORTION RIGHTS ACTION LEAGUE NATIONAL RIGHT TO WORK COMMITTEE PLANNED PARENTHOOD FEDERATION OF AMERICA THE FUND FOR THE FEMINIST MAJORITY IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the Sixth Circuit correctly interpreted the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life* to find that the provision of a state law, which prohibited corporations from making independent expenditures in support of or in opposition to candidates, was unconstitutional as applied to a non-profit ideological corporation that posed no threat of corruption.

PARTIES TO THE PROCEEDING

Richard H. Austin, Michigan Secretary of State

Frank J. Kelley, Michigan Attorney General

Michigan State Chamber of Commerce

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This *amici curiae* brief is submitted in support of appellee Michigan State Chamber of Commerce. By letters filed with the Clerk of the Court, appellants and appellee have consented to the filing of this brief.

INTEREST OF THE AMICI CURIAE

The *amici curiae* are non-profit voluntary corporations organized for various purposes, including the providing of certain services and the promotion of various political, ideological, and environmental issues.

The National Organization for Women ("NOW") is a non-profit membership corporation exempt from federal income taxes pursuant to 26 U.S.C. §501(c)(4). The purpose of NOW is to take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men. NOW's policy is set by a delegated membership conference. Only "natural persons" can be members of NOW.

Greenpeace Action is a non-profit corporation, established in 1987 to perform education, advocacy and grassroots lobbying in the United States on issues relating to the protection and preservation of environmental quality. Specifically, Greenpeace Action engages in campaigns to stop the threat of nuclear war, to protect the environment from nuclear and toxic pollution, to encourage the use of safe, renewable energy sources and to halt the needless slaughter of marine mammals and other endangered species. It is exempt from federal income taxes as a social welfare organization pursuant to 26 U.S.C. §501(c)(4).

The National Abortion Rights Action League ("NARAL") is a non-profit corporation dedicated to keeping abortion safe, legal, and accessible through participation in electoral politics (including independent expenditures), lobbying, litigation, and grassroots

organizing. NARAL has 300,000 members in 34 state affiliates and the national organization. NARAL is exempt from federal income taxes as a social welfare organization pursuant to 26 U.S.C. §501(c)(4).

The National Right to Work Committee ("NRWC") is an ideological, non-profit, membership corporation exempt from federal income tax pursuant to 26 U.S.C. §501(c)(4). (Its articles of incorporation and bylaws were amended to provide for membership following the litigation in *FEC v. NRWC*, 459 U.S. 197 (1982).) NRWC's purpose is to promote voluntary unionism. While not established by any business corporation or labor union, NRWC does have corporate, as well as individual, members which contribute to its support. NRWC has long taken an interest in the free speech and association rights of non-profit, ideological organizations and their supporters. For example, NRWC was the driving force which caused the Federal Election Commission, in January 1988, to open a still-pending project to amend its regulations to conform to the *MCFL* decision.

Planned Parenthood Federation of America ("Planned Parenthood") is a non-profit charitable corporation organized under the laws of the State of New York. It is the oldest and largest family planning organization in the United States. Although Planned Parenthood's tax-exempt status under 26 U.S.C. §501(c)(3) bars its participation in electoral politics, Planned Parenthood believes that the First Amendment guarantees it the right to do so through a separate organization not subject to the same restrictions. Planned Parenthood moreover believes that the First Amendment guarantees such a separate non-profit ideological organization the right to participate in the

electoral process by making independent expenditures out of general treasury funds.

The Fund for the Feminist Majority is an organization dedicated to encouraging social and political change in American society. It actively works to achieve the enhancement, protection and enforcement of the civil rights of women and to remove barriers to equal economic and political opportunity. The Fund for the Feminist Majority is incorporated under the laws of the District of Columbia as a non-profit corporation and is exempt from federal taxation pursuant to 26 U.S.C. §501(c)(4).

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), this Court determined that 2 U.S.C. §441b, which prohibits corporations or labor unions from making expenditures "in connection with" federal elections, is unconstitutional as applied to non-profit corporations "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. This Court began with the premise that the prohibited activity was political speech and therefore at the core of First Amendment protection. Political speech can be prohibited by an arm of the government only to the extent that the prohibition is narrowly tailored to meet a compelling governmental interest. In *MCFL* this Court found that the compelling governmental interest served by the prohibition of political speech by corporations was the prevention of corruption caused by the use of wealth amassed in the economic marketplace in the political marketplace. The Court further found that this interest was not served by prohibiting the political

speech of a non-profit incorporated voluntary political association and therefore found that Section 441b could not be constitutionally applied to MCFL.

Since *MCFL* was decided two and a half years ago, the Federal Election Commission ("FEC") has consistently sought to narrow, modify, or even nullify that ruling, with which it clearly disagrees. The FEC has repeatedly attempted to argue that the ruling is limited to a certain minuscule class of non-profit corporations. Indeed, the FEC has argued that it is the details of MCFL's organization—its small size, its lack of formality, its refusal to accept corporate contributions—which required the ruling. In so doing the FEC has attempted to obscure the central aspect of the *MCFL* ruling: that ideological, non-commercial and non-profit corporations cannot constitutionally be prohibited from electoral speech. The FEC has mechanistically focussed on one aspect of *MCFL*—the Court's recognition of MCFL's refusal to accept corporate contributions—and has claimed that ideological corporations receiving even a *de minimis* amount of corporate contributions are not entitled to First Amendment protection and therefore are subject to the restrictions of the law. In so doing, the FEC attempts to impute constitutional significance to the size of an organization or to the exact nature of its bookkeeping. In this case, the FEC has sought to take advantage of the Court's review of a state law similar to Section 441b in order to seek to persuade the Court to restrict its *MCFL* ruling.

In the case at bar, the statute at issue is Mich. Comp. Laws Ann. §169.254(1), which contains a prohibition analogous to that of Section 441b. The Sixth Circuit found that the statute cannot be constitution-

ally applied to a non-profit, ideological corporation which presents no danger of corruption. The philosophy of the organization involved, the Michigan State Chamber of Commerce, is the promotion of business. The organization also permits corporate members. For these reasons, the State of Michigan, and the FEC, which has filed an *amicus curiae* brief herein, claim that the organization is not entitled to the constitutional protection articulated in *MCFL*.

The *amici curiae* filing the instant brief are all non-profit, ideological, incorporated voluntary associations who are not subject to the control of any business corporations or labor unions. Indeed, the *amici* derive the bulk of their income from contributions by individuals. The *amici curiae* file this brief in opposition to the State of Michigan and the FEC because they believe that the FEC's interpretation of *MCFL* is unconstitutional and impossible to apply. If the FEC's attempt to rewrite *MCFL* were to be successful, that decision would be rendered constitutionally meaningless.

In particular, the FEC's emphasis in its *amicus curiae* brief on the size of organizations and on the receipt of any income from a corporate source as the "bright-line" distinguishing corporations protected by *MCFL* from corporations which are to be treated as commercial enterprises is constitutionally flawed. First Amendment protection should not depend upon the size of an entity. Neither should it depend upon adherence or non-adherence to formalities that are easily manipulated. The issues, instead, are whether or not the entity in question is genuinely a commercial enterprise or was organized for reasons other than economic profit, and whether the entity is a conduit

for business or labor union influence. The *amici curiae* believe that this is a factual matter that can be resolved by a trier of fact without resort to irrational arbitrary rules such as those favored by the FEC.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT RESTRICTING INDEPENDENT EXPENDITURES IN SUPPORT OF OR IN OPPOSITION TO CANDIDATES BY NON-PROFIT INCORPORATED VOLUNTARY POLITICAL ASSOCIATIONS IS UNCONSTITUTIONAL

A. Non-Profit Voluntary Organizations Have a Constitutional Right to Communicate with the Public About Important and Controversial Political Issues and About Candidates for Public Office

Non-profit voluntary political associations, whether incorporated or not, have a clear First Amendment right to make statements to the public about issues of importance and to thereby try to change public opinion and public policy. For this reason, judicial holdings in the area of election law carefully balance the interests served by the election provision in question against the First Amendment right to freedom of expression. This Court held, in *Buckley v. Valeo*, 424 U.S. 1 (1976), that the Federal Election Campaign Act and the regulations enforcing it must be read *narrowly*, since provisions that are imprecise or are read too broadly would tend to chill the exercise of free speech and thus violate the First Amendment.

More recently, this Court has repeatedly affirmed that expenditures in connection with elections "produce speech at the core of the First Amendment." *FEC v. NCPAC et al.*, 470 U.S. 480 (1985); *FEC v. MCFL*, 479 U.S. at 251. When a group spends money

to advocate its political position, the First Amendment clearly protects the activity. "Money is speech and speech is money." *Buckley v. Valeo*, oral argument, transcript at 24 (November 10, 1975), cited in *FEC v. National Organization for Women* ___ F.Supp. ___ (D.D.C. May 11, 1989, Civ. Action 87-2269).

First Amendment protection clearly applies to organizations with the same force as to individuals. In *FEC v. NCPAC, supra*, this Court forcefully rejected the notion that the corporate form of organizations "diminishes . . . entitlement to First Amendment protection." Membership organizations, this Court pointed out, are:

> mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to "amplif[y] the voice of their adherents." *Buckley v. Valeo*, 424 U.S. at 22; *NAACP v. Alabama*, 357 U.S. 449, at 460 (1958); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-296 (1981).

470 U.S. at 494. Thus, the First Amendment right of an organization carries the collective weight of the constitutional privilege of all its individual members or supporters.

B. Content-based Restrictions of Electoral Speech are Constitutional only if they are Narrowly Drawn to Meet the Compelling Government Interest of Preventing Corruption

When a statute burdens First Amendment rights, it must meet a compelling state interest. *Williams v. Rhodes*, 393 U.S. 23, at 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). In *FEC V. NCPAC*, this

Court strongly reaffirmed its prior holdings that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497. Regulations that burden First Amendment rights must, furthermore, be "narrowly tailored to the evil that may legitimately be regulated." 470 U.S. at 496.

In *FEC v. NCPAC*, this Court also observed that the evil to be avoided by election law is the corruption of public officials by funds received from supporters. Funds spent *independently* of candidates do not pose that same risk. See also *FEC v. NRWC*, 459 U.S. 197, 207-208 (1982). "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-260. Thus, restrictions on independent expenditures, which are funds spent on communicating with the public, require a greater showing that they are narrowly drawn to meet a compelling government interest.

C. The *MCFL* Description of Non-Profit Advocacy Corporations Must be Reaffirmed in Light of the Constitutional Requirement that Government Prohibition of Speech be Narrowly Drawn to Meet a Compelling Government Interest

Applying these principles, this Court held in *MCFL*, *supra*, that the Section 441b restriction on independent corporate spending is unconstitutional as applied to non-profit corporations "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259. In that case, a non-profit group organized for political purposes made independent expenditures expressly advocating the election or defeat of certain

candidates for public office. In so doing, MCFL violated Section 441b of the Federal Election Campaign Act.

This Court found that the prohibition in Section 441b was an infringement upon constitutionally protected speech without a compelling justification. The principal concerns of the law were political corruption and "the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. This Court further found that political voluntary associations do not present such dangers even if they do enjoy certain legal protections of the corporate form. Corporations with "features more akin to voluntary political associations than business firms", 479 U.S. at 263, cannot be required to comply with the requirements of Section 441b as to independently spent funds. This Court observed also that the only reason for distinguishing corporate entities from all others was:

> . . .the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.

479 U. S. at 263. This Court acknowledged the Congressional concern that funds accumulated in the economic marketplace not give an unfair advantage in political life as a justification for applying Section 441b to "*commercial enterprises.*" *MCFL*, 479 U. S. at 263. A non-profit ideological group does not present that danger when it spends its money independently of candidates on political messages to the general public. Accordingly, restricting the speech of

such groups does not narrowly further the governmental interest of preventing corruption. Indeed, the relative wealth of such groups reflects their political popularity. Unlike commercial corporations, advocacy groups are conduits for individual political speech and receive contributions for that purpose.

At issue in the case at bar is the Sixth Circuit's interpretation of the three-prong test set forth by this Court in *MCFL* for ideological non-profit organizations whose independent expenditures cannot be constitutionally restricted by Section 441b. The three criteria set forth by this Court are, generally, as follows:

(1) the corporation was founded to promote political ideas, not to make money (i.e., it is "ideological");

(2) the corporation has no shareholders or others with a claim on its earnings; and

(3) the corporation is not controlled by a profit-making corporation or labor union in the sense of serving as a conduit for the funds of such organizations.

MCFL, 479 U.S. at 264. The above three criteria must be viewed in light of the overall structure of First Amendment analysis. The central premise, always, must be that regulation of speech is disfavored. The burden is on the government to show that prohibition of electoral speech can survive constitutional scrutiny because it is narrowly drawn to meet a compelling government interest.

The first criterion above serves the purpose of assuring that corporations which have the potential of

corrupting the political process by infusing the proceeds of business ventures into politics are barred even from independent political expenditures. To meet this requirement, an organization must not only be non-profit, but must have as its central purpose the promotion of ideas, as distinguished from the accumulation of capital. The Sixth Circuit found that the appellee "exists for purely ideological purposes." Whether or not that is the case is a factual matter that can be ascertained by a trier of fact.

The second criterion above serves the purpose of assuring that ideas and politics, not business, enter into decisions made by individuals to join or to leave the organization in question.

The third criterion is designed to avoid the possibility that a non-profit, ideological entity meeting the above two requirements will merely be a "conduit" for "direct spending that creates a threat to the political marketplace." In other words, the non-profit and ideological status of a corporation cannot simply be a sham front to conceal business or labor union activity in politics. MCFL met this requirement because it was not established by a business corporation or labor union and because it did not even accept contributions from such entities. There are other ways to meet this requirement. Consistent with the First Amendment analysis set forth above, all entities which can show that they meet requirements (1) and (2) above and for whom the government cannot show that they are conduits for the infusion of corporate or labor union funds into the political process must be exempt from the requirements of Section 441b.

D. The FEC's *Amicus Curiae* Brief Misconstrues the *MCFL* Holding by Interpreting it as Requiring that Corporations Meet Various Criteria that are Irrelevant to First Amendment Analysis

The FEC appears to have overlooked the fact that the *MCFL* decision, and the criteria for corporations set forth therein, are based on First Amendment law. Instead, the FEC views the factual circumstances and accidents of MCFL's organization as a regulatory framework which must be met in every particular detail by organizations asserting their First Amendment privilege. A corporation, in the FEC's view, must be exactly like MCFL in numerous irrelevant ways in order to merit the agency's blessing for constitutional protection.

The *amici curiae* respectfully submit that the FEC has stood constitutional analysis on its head by arguing that only a limited class of ideological non-profit groups merits First Amendment protection. As we noted above, government regulation of speech must be narrowly drawn to meet a compelling government interest. Therefore, the burden is on the government to show that organizations must be regulated. The burden is not on the organizations to show that they are exactly like MCFL and therefore merit First Amendment rights.

The fallacy of the FEC's analysis is clear when its position is reviewed in detail. The FEC argues that accepting any contributions, however small, from any corporate or labor union entity removes an organization's right to First Amendment protection. See FEC's *amicus curiae* brief, page 16, note 8. This is clearly incorrect. The purpose of the third prong of the *MCFL* test is to exclude entities that are *conduits*

for labor or business influence into the political process. Incidental (*de minimis*) amounts do not prove the existence of a conduit from business to politics. The absurdity of the FEC's position is evident when we consider that, according to the FEC, a single contribution from a single incorporated entity, such as a professional corporation, would remove an organization's right to First Amendment protection. The First Amendment does not cease to apply to an ideological entity simply because one of its members pays her or his membership dues through a professional corporation's checking account, instead of through a personal account, or simply because a corporation has contributed to it. According to the FEC's logic, MCFL itself would lose First Amendment protection if it received a single contribution from an individual who has incorporated her business as a professional corporation.

A clear example of the consequences of the FEC's position was presented in *FEC v. National Organization for Women*, ___ F.Supp. ___ (D.D.C. May 11, 1989), where the FEC argued that a non-profit ideological membership association which received an estimated 1% or less of its *total* budget from corporations or labor unions and only permitted "natural persons" to be members was not covered by the *MCFL* ruling. In that case, the FEC asked in discovery for an exact accounting of all funds received by the association from corporate or union entities, insisting that this data was crucial to determining whether or not NOW is covered by the constitutional protection of *MCFL*. This inquiry extended even to receipt of membership payment checks. NOW did not have this information available, since no current law

requires it to segregate funds received from corporations or labor unions. In order to have such information, NOW would have to review *each* membership payment and contribution to determine if it was made from a personal or a corporate (such as professional corporation) account.

If the FEC's limitation of *MCFL* is accepted by this Court, the agency will no doubt engage in similar discovery tactics elsewhere. Furthermore, if the FEC's argument prevails, non-profit ideological organizations will be required to engage in heretofore unnecessary, expensive accounting maneuvers as the price of constitutional protection. For example, in order to keep track of corporate contributions, advocacy organizations will have to review voluminous records; most of them receive small, numerous contributions. The extra burden imposed on the exercise of First Amendment rights will not reduce corruption. It will simply be an incentive for advocacy groups to become unincorporated associations.

The third prong of *MCFL* is not a mechanical process. Rather, it requires analysis to determine if an organization's treasury actually is a conduit for corporate or labor union power rather than "an indication of popular support for the corporation's political ideas." *MCFL*, 479 U.S. at 258. If the corporation receives its financial support from individual members and/or contributors and makes decisions in a manner that precludes corporate or union influence, for example, it is clearly not a conduit for business or union power, even if an occasional corporate contribution is received. The FEC's argument, both in its *amicus curiae* brief and in *FEC v. NOW*, *supra*, places a premium on mechanics at the cost of logic. The FEC's

proposed "test" for eligibility for *MCFL* protection would not disclose or prevent corruption and would not disclose or prevent corporate or union dominance of politics. It would only burden political speech.

Amicus curiae Common Cause supports the FEC's argument on the ground that it would establish a "bright-line" rule for conduct. See brief *amicus curiae* of Common Cause, pp. 20-26. As noted above, the laudable desire for "bright-line" rules does not justify constitutional infringement. *MCFL*, 479 U.S. at 263. Furthermore, as the *FEC v. NOW* discovery demonstrated, the FEC's position does not in reality provide a "bright-line" rule that is easy to administer, since it would necessitate voluminous review of membership checks and contributions. This review would itself pose First Amendment problems.

The FEC also argues that the *size* of a corporation is indicative of its entitlement to First Amendment protection under *MCFL*. See FEC's *amicus curiae* brief, pp. 8, 10-11. This argument is based, apparently, on the claim that large entities can afford a separate segregated fund; hence, they are not burdened by the requirements of Section 441b and do not need the First Amendment rights articulated in *MCFL*. The FEC apparently believes that larger entities are only entitled to a reduced standard of free speech. This again stands constitutional logic on its head. Constitutional rights are not based on size or wealth; these rights are absolute. The rich do not lose free speech rights simply because they can circumvent some restrictions by spending more money. Furthermore, the burden is not on the organization to show that it is burdened by regulation and merits constitutional protection. Rather, the burden is on the government to show that it needs the narrowly drawn regulation in order to further a compelling interest. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777 (1986).

Similarly, the FEC argues that the informality of an organization and its relative ability to establish a separate segregated fund is a yardstick of constitutional protection. See FEC's *amicus curiae* brief, pp. 8-9. *Amici curiae* note that in making this argument the FEC cites a portion of the *MCFL* opinion which was not joined by a majority of this Court. The FEC distorts *MCFL* by arguing that entities which are well-organized and administered deserve less constitutional protection than the inefficient. Furthermore, this standard for constitutional protection would be virtually impossible to apply in a consistent manner.

The FEC argues that the above "rules" are needed to prevent the abuse of *MCFL* by business corporations and labor unions. This is not the case. Abuses of *MCFL*, presumably occurring when an advocacy group is merely the conduit for labor or business interests, can be addressed by narrowly tailored regulations and precise factfinding. The law should not use an ax when a scalpel is available, especially where restrictions of free speech are concerned.

E. Conclusion

The Sixth Circuit opinion correctly interpreted *MCFL* to find that the provision of a state law, which prohibited corporations from making independent expenditures in support of or in opposition to candidates, was unconstitutional as applied to a non-profit ideological corporation that posed no threat of corruption.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State,
and
FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
a non-profit Michigan Corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE APPELLEE

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No. 88-1569

IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD H. AUSTIN,
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MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan Corporation

Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE APPELLEE

INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) hereby file this brief as amici curiae with the written consent of the parties.

The Washington Legal Foundation is a non-profit public interest law and policy center with over 120,000 members nationwide that engages in litigation and

administrative proceedings on a variety of issues of concern to its membership. In particular, WLF has championed the First Amendment rights of individuals and businesses in a number of cases before the Court. *See, e.g., Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric v. Public Utilities of California*, 475 U.S. 1 (1986); *Boos v. Barry*, 108 S. Ct. 1157 (1988).

The Allied Educational Foundation is a non-profit charitable and educational foundation based in New Jersey that is devoted to the expansion of knowledge and education in a broad variety of areas, and has appeared with WLF as amicus before this Court on a number of occasions. Both WLF and AEI believe that the public interest is best served by full and robust debate on electoral issues, and that laws prohibiting such speech are wholly at odds with the guarantee of freedom of speech provided by the First Amendment.

STATEMENT OF THE CASE

The appellee, Michigan State Chamber of Commerce (Chamber), desired to communicate its views to the public at large in 1985 by purchasing a one-quarter page advertisement in the *Grand Rapids Press* (the only major daily in that area). That communication, for the most part, discussed the Chamber's views on important economic issues, particularly those policies that affect the growth of jobs in the State of Michigan. The advertisement concluded by informing the reader that a particular candidate running in a special election shares those concerns, and asked the reader to "elect" that candidate to office. A copy of that proposed advertisement is reproduced in the appendix to this brief, and in the Joint Appendix (J.A.) at 17a. As an independent expenditure, there was no coordination or

communication with the candidate about the placement of the advertisement.

The Chamber, which is a non-profit corporation, was, however, prohibited from communicating its views because it is a felony under Michigan law for an entity that happens to be incorporated to make any expenditure to assist or oppose any candidate, including independent expenditures of the kind the appellee wished to make. Section 54(1) of the Michigan Campaign Finance Act, M.C.L. § 169.254(1). However, media corporations, (§ 169.206(3)(d)) and corporations "formed for political purposes" (§ 169.254(2)) are not prohibited from making such expenditures. In addition, individuals, partnerships, and unincorporated entities such as labor unions are not prohibited under Michigan law from making such expenditures, and are thus free to exercise their First Amendment rights in an uninhibited and robust way. In addition, such unincorporated entities can make direct contributions to political candidates.

Plaintiff filed suit challenging the constitutionality of the Michigan statute as violative of the First Amendment guarantee of free speech and the Fourteenth Amendment's guarantee of equal protection, as well as violative of the Michigan constitution. The district court held that Section 54(1) does not violate the First or Fourteenth Amendments to the Constitution. *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986). The U.S. Court of Appeals for the Sixth Circuit reversed, finding that the law does contravene the First Amendment. *Michigan State Chamber of Commerce v. Austin*, 856 F.2d 783 (6th Cir. 1988). Accordingly, the court of appeals did not reach the equal protection issue, or whether the law is narrowly tailored to satisfy a compelling

governmental interest in restricting such communications.[1]

---

[1] While the special election in question has long past, *amici* submit that this case is not moot. While the court of appeals did not address the mootness question, the district court did, finding that the case falls within the class of controversies "'capable of repetition, yet evading review.'" 642 F. Supp. 397 (W.D. Mich. 1986)(quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In *Meyer v. Grant*, 108 S.Ct. 1886 (1988), this Court did not find moot a constitutional challenge to Colorado's law that prohibited the plaintiff in that case from paying petition circulators to gather signatures necessary to put a initiative measure on the ballot for the November 1984 election. *Id.* at 1890, n.2. As the Court stated in *Meyer*, the test for mootness is (1) whether the challenged action in its duration is "'too short to be fully litigated prior to its cessation or expiration'" and (2) whether there is a "'reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

In both the *Bellotti* and *Meyer* cases, the Court noted that the parties indicated that they planned to engage in the specific actions under challenge in the future. In the case at bar, the candidate in question won the special election. Although the appellee did not specifically allege that it intended to make independent expenditures in the form of "public statement[s] by purchasing ...advertisement[s]" in support of or in opposition to future political candidates (Plaintiff's Complaint, ¶ 14, J.A. 6a), it did allege that it desired "to timely, effectively, and fairly participate in . . . other elections held in the State of Michigan" (*Id.*, ¶ 19; J.A. 7a), and that enforcement of the ban on independent expenditures by corporations would preclude it from "fully and fairly participating in . . . any succeeding election. . . ." *Id.*, ¶ 29; J.A. 9a.

We think that these allegations could be fairly read to mean that the appellee wishes to "participate" in the electoral process not in the general sense, but by making independent expenditures in the future in the form of paid political advertisements of the kind it proffered for the Special Election in 1985, as opposed to making independent expenditures that do not necessarily result in actual speech or communication. In addition, it is amici's understanding that the time from the date a person announces his candidacy for state elective office to the date of the election is usually less than 18 months, a time period determined in *Bellotti* to be insufficient for plenary review. Accordingly, appellee satisfies both parts of the mootness test.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held § 54(1) unconstitutional under the First Amendment's guarantee of freedom of speech. Section 54(1) makes it a felony for a non-profit yet incorporated association to pay for a newspaper advertisement informing the public about its views on important economic issues, and how the citizenry can act to advance those issues by electing a candidate whom the association believes is sympathetic with those concerns. The free and open marketplace of ideas guaranteed by the First Amendment becomes less free and open by excluding from the market certain ideas and views simply because they are funded by a corporate entity. The public needs more information, not less, about issues that affect its well-being and self-governance, especially about candidates for public office who could, if elected, be in a position to act on those concerns. The First Amendment protects the public's interest in receiving information. The public can intelligently weigh the merits of the speech and assess the credibility of the speaker without the draconian and patronizing measure of preventing all such financed speech from reaching their attention.

The state interest advanced to justify the complete ban on the financing of such communications is not sufficiently compelling to overcome the protection of the First Amendment, especially where there has been absolutely no evidence adduced in the district court nor any legislative findings that independent expenditures of

this kind have a corrupting influence. This is not surprising, for as this Court has repeatedly acknowledged, independent expenditures, which are uncoordinated with the candidate and indeed may be unwelcomed by him, do not have the tendency to corrupt the candidate or give the appearance of corruption.

Indeed, since corporations are permitted under the law to expend unlimited treasury funds for a myriad of political purposes (*e.g.*, communications to its members on candidate and political issues; administration of its political action committees, lobbying, contributions to elected officials' officeholder expense funds), one may legitimately ask what evil is prevented by prohibiting the publication of pure speech. Such an unlimited use of treasury funds for political purposes totally undercuts the state's alleged interest in preventing large amounts of corporate money from being used in the political process, and the interest in protecting the rights of the dissenting shareholder.

Even if a governmental interest in limiting large corporations from overwhelming the electorate with too much political speech is compelling, a complete ban on all such speech is not a narrowly tailored or precisely drawn means of serving that interest. The proposed speech in this case was a simple, concise message, that would be published on only one day as a quarter page advertisement in a newspaper, at a cost of approximately $1,100, an amount roughly equivalent to 13 cents from each of the 8,000 members of the Chamber. There is no showing that such a modest independent expenditure would corrupt or appear to corrupt the candidate or dominate the marketplace of ideas, assuming that such a marketplace can have a surfeit of ideas. It would be a felony for the Chamber

even to respond to a voter's legitimate request for information on the Chamber's position on a candidate, for even that modest communication would necessarily entail expenditures for postage, telephone, photocopying, administrative costs, and the like.

Mere administrative convenience achieved by prohibiting *all* independent expenditures by corporate entities is not a sufficient reason for the state to escape its obligation to narrowly tailor its restrictions on pure speech to serve the alleged compelling interest.

Finally, the court of appeals decision can also be affirmed on the grounds that the law violates the equal protection clause of the Fourteenth Amendment in that it does not prohibit such expenditures by individuals, partnerships, or unincorporated associations such as labor unions, or incorporated media organizations.

ARGUMENT

I. MICHIGAN'S LAW PROHIBITING INDEPENDENT EXPENDITURES BY INCORPORATED ENTITIES IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

As is recognized by all the parties, this Court has never expressly held that the state may constitutionally prohibit a corporation from expending funds independently of candidates' campaigns to disseminate its views about those candidates. The lower court correctly held the Michigan statute in question was unconstitutionally applied to a non-profit ideological corporation such as the Chamber, "for it infringes upon speech at the core of the first amendment without a compelling justification." 856 F.2d 783, 790 (footnote

omitted). The court found no actual corruption by such speech, nor any appearance or threat of such corruption, and found that the attributes of the Chamber were sufficiently similar to the attributes of the non-profit corporation in *Federal Election Commission v. Massachusetts Citizens for Life Committee*, 479 U.S. 238 (1986), where the Court struck down as unconstitutional as applied a federal statute similar to the one at bar that prohibited all corporations from making any expenditures, independent or otherwise. *Amici* further submit that even if the Court were to treat the Chamber as more of a traditional "for profit" corporation, the state has nevertheless failed to demonstrate a compelling governmental interest in banning pure speech that is made independently of any candidate.

A. THE MICHIGAN LAW BANS POLITICAL SPEECH THAT LIES AT THE CORE OF THE FIRST AMENDMENT

There can be no question that the speech which the Chamber wishes to make and disseminate is core political speech which deserves the highest protection by the first amendment. As this Court stated in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> [D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered interchange of idea for the bringing about of political and social changes desired by the people' *Roth v. United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957). . . .In a republic where the people are sovereign, the ability

> of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 [91 S.Ct. 621, 625, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted' that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'

Id. at 14-15. The proposed communication in the case at bar attempted to inform the citizenry about issues of importance to them, and the Chamber's view of the qualifications of a candidate with respect to those issues. In an age of 30-second campaign commercials, sound bites, bumper strips, campaign rhetoric and hoopla, the proposed advertisement is a refreshing piece of serious information about the growth of jobs in Michigan and the expert views of an organization as to where a particular candidate stands on those issues. This communication may very well be the only substantive information that a voter might glean about the candidate before entering the voting booth. At the same time, the Chamber takes the risk that some voters may oppose the Chamber's views on the matter and for that reason may vote against the candidate supported.

The fact that this core political speech is financed by a corporation does not lessen the protection that such speech deserves. As this Court stated in *First National Bank of Boston v. Bellotti*, 435 U.S. 776 (1978):

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and

> this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of this speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 780. *See also Pacific Gas & Electric v. Public Utilities of California*, 475 U.S. 1, 8 (1986)(the "identity of the speaker is not decisive in determining whether speech is protected").

Amici recognize that the Court in *Bellotti* dealt with the constitutionality of a law that made it a crime for a corporation to finance expenditures relating to a referendum as opposed to a political campaign. The Court did not foreclose, however, a challenge against laws that prohibit corporate independent expenditures on political campaigns, noting that "Congress *might well be able* to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Bellotti*, 435 U.S. 765, 788, n. 26 (emphasis added). While amici submit that Congress could not be able to demonstrate the existence of such corruption, it is clear that the State of Michigan, in fact, has not made such a demonstration.

B. THERE HAS BEEN NO SHOWING OF A COMPELLING GOVERNMENTAL INTEREST IN BANNING ALL INDEPENDENT EXPENDITURES MADE BY THE CHAMBER

While amici recognize that the prevention of the corruption of candidates is an important governmental interest, such an interest does not, by its mere articulation, justify a sweeping ban on all political speech made by an incorporated entity such as the Chamber. The State of Michigan has failed abysmally to demonstrate that independent expenditures corrupt or tend to corrupt candidates who later become officeholders.

The appellants seem to argue that simply because Miichigan has long had laws on the books preventing such expenditures, that in and of itself is sufficient demonstration that independent expenditures pose a threat to the integrity of the electoral process.[2]

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[2] Aside from the circular reasoning of such a statement, the historical references are misleading and inaccurate. The Appellants state "In 1913, six years after Congress passed the Tillman Act, Michigan enacted the Corrupt Practices Act which banned the use of corporate treasury funds for the payment of election expenses. This statutory ban withstood a constitutional attack in *People v. Gansley*, 191 Mich. 357; 158 N.W. 195 (1916)." Appellants' Brief at 5-6 (footnotes cited omitted). The district court similarly stated, "It does not matter, of course, that there has not been a finding of actual corruption, given that corporate independent expenditures for candidates have been banned since 1913." *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397, 404 (W.D. Mich. 1986). However, the Corrupt Practices Act enacted in 1913 did *not* ban corporate independent expenditures, but only made it illegal to "pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation *to any candidate or to any political committee*, for the payment of any election expenses

Appellants' Brief at 5-6, 33. The appellants are simply unable to point to any evidence, however, that independent expenditures have or are likely to have a corrupting influence on candidates who become officeholders.

The district court merely opined, without reference to any supporting evidence, that independent expenditures "*may* . . . create an atmosphere of distrust or the appearance of corruption" (emphasis added) and cited *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 209 (1982). 643 F. Supp. 397, 403-04. The district court's *ipse dixit* certainly is not sufficient to satisfy the scrutiny demanded in this case.

In the first place, the appellants' reliance on cases such as *National Right to Work*, *supra*, and *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) are inapposite since those cases dealt with "contributions" and not with independent expenditures. Secondly, since independent expenditures are by definition made independently of the candidate without any prior cooperation, the *quid pro quo* that might be attached to a contribution made directly to a candidate is not present. As this Court observed in *Federal Election Commission v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985):

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's

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whatever." 1913 Mich. Pub. Acts 109, § 14. *See People v. Gansley*, *supra*, 158 N.W. 195, 197. The current law, MCL § 169.254(2), is much broader, making it a felony to "make a contribution *or expenditure*," which includes independent expenditures of the kind, which by definition, are not "given" to any candidate or committee.

> campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. [*Buckley v. Valeo*,] 424 U.S., at 47, 96 S.Ct., at 648.
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> * * *
>
> It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. *On this record*, such an exchange of political favors for uncoordinated expenditures remains a *hypothetical possibility and nothing more*.

Id. at 1469 (emphasis added).

Similarly, the record in the case at bar is bereft of any evidence that independent expenditures cause corruption or are viewed as likely to cause corruption. While the state can take prophylactic measures to prevent corruption, it certainly does not have carte blanche to run roughshod over the First Amendment without any showing that the prophylactic measure was needed. For example, in *Texas v. Johnson*, 57 U.S.L.W. 4770 (1989), this Court held that burning the American flag is "symbolic speech," ruling unconstitutional as applied a Texas statute forbidding desecration of the

flag. The Court rejected as uncompelling the state's interest in preserving the integrity of our nation's symbol as well as prohibiting a breach of the peace that may be occasioned by public flag burning. As for the latter state interest, the Court had no problem second-guessing the wisdom of Texas state legislature's enactment of a prophylactic measures to prevent the breach of the peace. The Court noted that in this particular case, no breach of the peace occurred, and that "[n]o reasonable onlooker would have regarded" the protestor's flag burning as an "invitation to exchange fisticuffs." 57 U.S.L.W. at 4773. While many would sharply disagree with this Court's assessment on that point, *amici* submit that it can be safely assumed that no reasonable citizen would regard the Chamber's proposed advertisement as a corrupting influence on the candidate.[3] Michigan, as do the other states, has laws prohibiting bribery and attempted bribery. There is also a plethora of disclosure laws that are more narrowly tailored to ensure the integrity of the electoral process than the sweeping ban of an entire category of speech.

Appellants make much of the fact that the Chamber has numerous ways in which to participate in the electoral process without having to use its treasury funds to pay for the independent expenditure in

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[3] It should be noted that although the communication involved in this case deals with an independent expenditure that advocates the election of a candidate, the law also prohibits the expenditure of corporate funds to pay for independent expenditures that advocate the defeat of a candidate. While the Chamber did not specifically allege that it intended to make such expenditures, it did not rule them out either. *Amici* submit that while there is no showing that positive independent expenditures cause corruption, it is even less likely that negative independent expenditures would do so. The maker of such an advertisement may be opposing the greater of two evils, with no expectation or desire to obtain any favors from the other candidate not attacked.

question. Appellants' Brief at 52 (Chamber may use its treasury funds, *inter alia*, to pay for the administration and solicitation costs of its political action committee; to contribute to ballot committees; to donate to an elected official's officeholder expense fund; to pay for communicating to its members its views on political candidates; to contribute to political party organizational activities).

All of this electioneering activity that can be lawfully financed by the Chamber's treasury merely undercuts the alleged state interest in preventing corruption or the appearance of corruption by the use of corporate funds to pay for pure speech, as well as the other alleged interest in protecting the objecting shareholder from having treasury funds spent on partisan activities. Ironically, it may very well be that all of these permitted political contributions and expenditures by treasury funds have caused many people to have a negative image of corporate or union political action committees, rather than the modest communication of pure speech proposed to be made by the Chamber with its own funds.

Indeed, Michigan readily admits that the Chamber's Political Action Committee (PAC) could have lawfully paid for the proposed advertisement. Yet the Chamber testified in the court below that because of a media attack on the bona fides of such political action committees, an expenditure by the PAC with the corresponding disclosure that such communication was paid for by the Chamber PAC, would have less credibility, and hence generate more distrust of PACs. J.A. 153a (LaBrant testimony). In other words, it appears that an advertisement financed directly by the Chamber will generate greater credibility and trust than the one paid for by the Chamber's PAC.

Since most of the copy in the proposed advertisement is merely issue discussion rather than express advocacy, the Chamber could easily split it in two for a double display advertisement. The one advertisement could be devoted to a discussion of the issues in the campaign without expressly advocating the election of the candidate who shares those same views (such as the first five paragraphs of the proposed advertisement reproduced in the Appendix hereto). Such an advertisement can be paid for lawfully with the Chamber's treasury funds. The final "Elect Candidate X" message, which can lawfully be financed by the Chamber's PAC, could then be placed in a separate advertisement right next to the issue discussion advertisement. The Chamber could also publish the advertisement in its own newsletter to its members, and encourage them to "pass it along" to a friend or neighbor.

All of this merely demonstrates that the state has woefully failed to show that corporate independent expenditures would cause corruption or the appearance of corruption. The numerous activities that may be financed with treasury funds simply pale in comparison to the modest advertisement the Chamber wishes to make in this case, and thereby calls into question the legitimacy of the state's alleged compelling governmental interest. As this Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. *Mills v. Alabama*, 384 U.S., at 220, 86 S.Ct., at 1437.

Id. at 45.

While the Chamber does not propose to expend "unlimited sums" or "obtain improper influence over candidates," the state's complete ban on independent expenditures by corporations is an arbitrary restraint that does not serve any compelling governmental interest. It is simply ludicrous to suggest that if there were any possibility of corruption by the financing of the advertisement by the Chamber, such a possibility would vanish or be diminished if the disclaimer at the bottom of the advertisement were to read "Paid for by the Michigan State Chamber of Commerce PAC," instead of "Paid for by the Michigan State Chamber of Commerce." Indeed, the candidate might appreciate the PAC financed message more, knowing that the aggregate amount of funds expended by that interest group and its PAC were greater than the cost of the advertisement alone, since the Chamber had to expend its own funds to generate the PAC funds that ultimately were used to pay for the advertisement.[4]

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[4] Testimony in the district court indicated that the administrative costs to a corporation may be as high as 50 percent of the amount spent by PAC. (J.A. 103a, 108a) (Mayberry testimony). Thus, an independent expenditure by a PAC in the amount of $2,000 actually represents an aggregate outlay of $3,000 by that interest.

Accordingly, *amici* submit that this content-based ban on speech by incorporated entities is not narrowly tailored to serve a compelling governmental interest even assuming a threat to that interest exists.

II. SECTION 54(1)'S BAN ON INDEPENDENT EXPENDITURES BY CORPORATE ENTITIES VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THE LAW PERMITS SUCH EXPENDITURES TO BE MADE BY MEDIA CORPORATIONS AND UNINCORPORATED ENTITIES

While the court of appeals did not need to address the appellee's claim that Section 54(1) violates the Equal Protection Clause of the Fourteenth Amendment, this Court can of course affirm on those grounds since the issue was raised and briefed in the lower courts. The appellants opening brief simply dismisses the argument as "meritless," citing to footnote 11 of this Court's decision in *Federal Election Commission v. MCFL*, 479 U.S. 238, 258-259, n.11. Appellants' Brief at 17, n.14. However, the party in that case and in similar cases did not raise an equal protection challenge to the federal legislation. Indeed, unlike the federal legislation which treats corporations and labor unions in a roughly equivalent way, 2 U.S.C. § 441b, Michigan and ten other states prohibit corporate contributions and expenditures, but allow union contributions and expenditures to be made.

It is well established that a corporation is a "person" under the Equal Protection Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). The district court in this case properly stated the test to be employed as follows:

> Federal courts consider legislative distinctions presumptively invidious when those distinctions burden the exercise of a fundamental right under the Constitution. *Plyer [v. Doe]*, 457 U.S. at 216-217....In order to survive scrutiny under the Fourteenth Amendment, such distinctions must be precisely tailored to serve a compelling state interest. *Id.* at 217....In this case, section 54(1) of the Act burdens plaintiff's exercise of its First Amendment right to freedom of speech, which is a fundamental right under the Constitution. Therefore, any distinction in section 54(1) between plaintiff and other persons must be *precisely tailored to serve a compelling state interest.*

Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 405 (W.D. Mich. 1986) (Emphasis added). The district court, however, incorrectly concluded that there was no violation of the equal protection clause because of the alleged "unique threat of corporate power to the electoral process." *Id.* As demonstrated in the prior section of this brief, the compelling state interest of preventing corruption by prohibiting independent expenditures is illusory. In addition, if the harm to the electoral process is the expenditure of large sums of money by entities, it is irrelevant whether the entity involved is incorporated or not.

Nor is the distinction between these entities narrowly tailored to serve the alleged compelling state interest. A small dry cleaning establishment that happens to be incorporated is banned from making any independent expenditures, yet an unincorporated union with thousands of members and a large treasury are free to spend unlimited amounts on such expenditures.

Similarly, Michigan's law allowing unlimited expenditures by media corporations violates the Equal Protection Clause. M.C.L. § 169.206(3)(d) excludes from the definition of "expenditure" any "newsstory, commentary, or editorial in support of or opposition to a candidate" by any "broadcasting station, newspaper, magazine, or other periodical or publication." The district court found no violation of the equal protection clause because "[a]ny corporation....may avail itself of the exemption...." 643 F. Supp. at 405. While it is true that the Chamber may publish a magazine or newspaper carrying a commentary on a particular candidate, the only effective way of getting the message across to the electorate as a whole rather than to the Chambers members is by purchasing space in widely circulated newspaper. The law in effect gives a monopoly to corporations owning generally circulated newspapers to inform the electorate about the qualifications of the candidates.

Amici submit that these distinctions cannot survive a casual scrutiny, let alone a strict one, to determine whether a compelling interest is served. Not surprisingly, the lower court failed to refer to *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1976) and *Carey v. Brown*, 447 U.S. 455 (1980) which we believe are dispositive of the issues here. In those cases, the Court struck down state statutes that prohibited picketing near certain buildings and residences, except for certain labor pickets. *Cf. Boos v. Barry*, 108 S.Ct. 1157, 1170 (1988). Similarly, in this case, the state has not demonstrated why expenditures by unincorporated entities are less corrupting than those made by incorporated entities. Accordingly, ban on independent expenditures by incorporated entities cannot survive under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision of the court of appeals on the grounds that the ban on independent expenditures is a clear violation of the First Amendment, or in the alternative, that such a law violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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July 28, 1989

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th,
Elect Richard Bandstra
State Representative
93rd House District
Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

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